LIBRARY
SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

---

No. 253

UNITED STATES OF AMERICA, PETITIONER,

vs.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

Petition for Certiorari Filed August 5, 1952

Certiorari granted October 13, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

---

No. 253

UNITED STATES OF AMERICA, PETITIONER,

vs.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

# INDEX


| | Original | Print |
|---|---|---|
| Record from U.S.D.C. for the Eastern District of Virginia, Alexandria Division | | |
| Petition for condemnation | 1 | 1 |
| Plat showing the location of all sanitary sewers in Belle Haven, etc. (Omitted in printing) | 7 | |
| Declaration of taking | 12 | 5 |
| Schedule "A"—Excerpts of Description of easement areas | 14 | 6 |
| Plan—Right of way, Contract 3C through property of Belle Haven, Inc. | 15 | 7 |
| Plan—Plat showing right of way etc. | 15A | 8 |
| Amended petition for condemnation | 45 | 9 |
| Revised plat showing the location of all sanitary sewers in Belle Haven, etc. (Omitted in printing) | 54 | |
| Motion of W. Ralph Davis et al. to intervene as defendants | 104 | 10 |
| Answer of interveners | 106 | 11 |
| Motion of Harry E. Cunningham to intervene as defendant | 122 | 13 |
| Amended motion of Harry E. Cunningham to intervene as defendant | 124 | 14 |

# Index Continued.


| | Original | Print |
|---|---|---|
| Exhibit A—Copy of Deed of Bargain and Sale dated June 8, 1935 | 125 | 15 |
| Exhibit B—Copy of Deed of Bargain and Sale dated September 3, 1935 | 127 | 16 |
| Memorandum of Opinion | 134 | 18 |
| Order granting leave to intervene | 138 | 21 |
| Interveners' motion for temporary injunction | 171 | 22 |
| Government's motion to strike certain portions of answer filed by intervening petitioners | 184 | 24 |
| Memorandum of opinion | 185 | 24 |
| Order granting motion to strike, denying motion for temporary injunction and allowing intervening petitioners thirty days to amend their answer | 191 | 29 |
| Amended answer of intervening defendants | 199 | 30 |
| Answer of Belle Haven Realty Corporation | 203 | 33 |
| Affidavit of Edward S. Holland, C.E. | 215 | 34 |
| Letter of authorization dated March 11, 1942, Franklin D. Roosevelt to General Fleming | 217 | 36 |
| Memorandum of opinion | 254 | 36 |
| Order dismissing petition | 260 | 41 |
| Proceedings in U.S.C.A. for the Fourth Circuit | 271 | |
| Argument and submission | 271 | 42 |
| Opinion, Parker, J. | 272 | 43 |
| Judgment | 284 | 50 |
| Clerk's certificate (Omitted in printing) | 288 | 51 |
| Stipulation as to record | 289 | 51 |
| Order allowing certiorari | 293 | 52 |

1 [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Miscellaneous No. 555

UNITED STATES OF AMERICA, *Petitioner*,

vs.

CERTAIN PARCELS OF LAND in the County of Fairfax, Commonwealth of Virginia, and Belle Haven Realty Corporation, et al. *Defendants*.

**Petition For Condemnation—Filed December 13, 1944**

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the United States of America, by its attorneys, at the direction and under the authority of the Attorney General of the United States, pursuant to the request of the Federal Works Administrator of the Federal Works Agency of the United States, and represents unto the Court as follows:

I.

This is a suit of civil nature, brought by the above-named petitioner, under the authority of the Act of August 1, 1888, 25 Stat. 357 (U.S.C. Title 40, Sec. 257); the Act of February 26, 1931, 46 Stat. 1421 (U.S.C. Title 40, Sec. 258(a) to 258(e)); the Act of October 14, 1940, as amended (U.S.C. Title 42, Secs 1531 to 1564, inclusive), funds having been appropriated by the Act of July 3, 1941 (Public No. 150, 77th Congress); the public use for which said perpetual easements are taken is the provision of public works or equipment for public works, pursuant to said Act of October 14, 1940, as amended.

II.

That pursuant to this Act, the Honorable Philip B. Fleming, Administrator of the Federal Works Agency of the United States
2 of America has selected for acquisition by the United States of America the land hereinafter described and has designated that the perpetual easements in and to said lands to locate, construct, operate, maintain, repair, replace and remove sewer pipe lines and appurtenances in, under, through, or over said lands are suitable and necessary for the purposes of the United States and that such selection and designation and determination have been and now are in full force and effect.

III.

That the perpetual easements in and to strips of land ten feet in width are lying and being in the County of Fairfax, Commonwealth and more particularly described as follows:

3 Perpetual easements in and to strips of land 10 feet in width lying and being in the County of Fairfax, Commonwealth of Virginia, to locate, construct, operate, maintain, repair, replace and remove sewer pipe lines and appurtenances, the center lines of said strips of land being particularly described as follows:

PARCEL 1: Beginning at Station 0 plus 00 a point in the center line of a 10 foot permanent easement, said point being South 48 degrees 03 minutes West 135.83 feet, South 74 degrees 43 minutes West 122.33 feet, North 23 degrees 44 minutes West 307 feet, North 40 degrees 52 minutes West 159.76 feet, North 67 degrees 21 minutes West 188.8 feet, and North 0 degrees 03 minutes East 104.96 feet from the radius point of the circle at the end of Wakefield Court; running thence South 51 degrees 00 minutes West 100.96 feet to Station 1 plus 00.96; thence South 84 degrees 39 minutes West 279.19 feet to Station 3 plus 80.15; thence North 77 degrees 13 minutes West 237.62 feet to Station 6 plus 17.77; thence South 88 degrees 17 minutes West 399.23 feet to Station 10 plus 17; thence North 54 degrees 18 minutes West 41.60 feet to Station 10 plus 58.60, a manhole near the South line of U. S. Route No. 1, said point lies North 24 degrees 01 minutes West 101.0 feet and South 63 degrees 21 minutes West 80 feet to center line of Fairhaven Avenue, which is situated on the North side of U. S. Route No. 1, as shown by plat "Right of Way Map, Contract 3C Through Property of Belle Haven, Inc. Fairfax County, Va." dated October 1944, made by Massey & Johnson, Fairfax, Virginia, copy of which is attached to the Declaration of Taking and filed in this proceeding and by reference thereto made a part hereof.

PARCEL 2: Beginning at Station 117 plus 94.73, a manhole 10 feet South of the North line of F Street and in the center line of 15th Street which is undeveloped; running thence with the center line of 15th Street North 13 degrees 41 minutes East 938.60 feet to a point; thence North 46 degrees 37 minutes East 43.13 feet to Station 108 plus 13, a point in the property line of the Belle Haven Country Culb, as shown by plat "Plat Showing R.O.W. Taking Sta 117 + 94.73 — Sta. 108 + 13 thru Property of Belle Haven Realty Corp. Fairfax County, Virginia" dated November, 1944, made by Massey & Johnson, copy of which is attached to the Declaration of Taking filed in this proceeding and by reference thereto made a part hereof.

IV.

That the following named persons have an apparent interest in the land to be condemned:

Belle Haven Realty Corporation Fairfax County, Virginia

and all persons or owners, known and unknown, having or claiming to have any right, title, interest, lien, encumbrance or claim of any kind in or against the subject to be divided or disposed of in this proceeding, and whom this proceeding may concern, including the heirs, assigns and devisees of the above persons as may be deceased whose names and addresses are wholly unknown to the petitioner.

V.

That the County of Fairfax is a political subdivision of the Commonwealth of Virginia and may have or claim some interest in the foregoing land for taxes and assessments due and unpaid against the said land, and is hereby made a party defendant to this proceeding.

VI.

That the Commonwealth of Virginia may have or claim some interest in this proceeding and is hereby made a party defendant.

VII.

That in addition to the parties designated by name herein, there are other parties, who are, or may be, interested in this action, and who may have or claim some right, title, interest, or lien in, to or upon the real estate, or some part thereof, in this petition described, that the name of each of said parties is unknown to petitioner and upon diligent inquiry cannot be ascertained, and all such parties are therefore made parties defendant to this action by the name and description of "Unknown Owners".

VIII.

That the purpose for which petitioner is taking said perpetual easements in and to said land are necessary and suited to the public use in that they provide for the location, construction, maintenance, operation, repair, replacement and removal of sewer pipe lines in, under, through or over said lands, in the County of Fairfax, Virginia, and that the use to which said property is to be applied is authorized by law; and that it is necessary that all of said property be taken and that no part of the property herein sought to be taken and condemned has been heretofore appropriated for public use.

5 WHEREFORE, upon consideration of the premises set forth your petitioner prays as follows:

(1) For a judgment against the property described herein, including all of the rights, title and interest therein, to the sole use and benefit of the United States of America;

(2) Adjudging that the public uses for which petitioner takes and condemns said perpetual easements in and to said land are necessary public uses of the petitioner, and that the uses to which said property are to be applied are uses authorized by law, and that all of said perpetual easements in and to said land are the necessary public uses of the petitioner, and that the uses to which said property are to be applied are uses authorized by law, and that all of the said perpetual easements in and to said land taken are necessary thereto;

(3) That an order of the Court be made requiring all persons concerned, particularly those whose names are set forth in this petition, to appear at the time and place in such order to be named, to make known their objections, if any they have, and their rights, title, claims, interest, or demand against said property or improvements thereon, of their respective interests therein, or any other matters material to their respective rights;

(4) That it be ascertained in this proceeding according to law what will be just compensation for said easements in and to said land to be condemned for said uses of the petitioner, and who are the persons having ~~any right, title, interest, estate or claim in or~~ to said property and improvements if any, proposed to be condemned and entitled to compensation therefor;

(5) That the perpetual easements in and to the lands hereinbefore described will be condemned and vested in the United States of America, and that your petitioner may have such other, further, necessary and general relief as may be proper in this case;

And your petitioner will ever pray.

UNITED STATES OF AMERICA
By HARRY H. HOLT, JR.
Harry H. Holt, Jr.
*United States Attorney*

By C. J. COLLINS
C. J. Collins
*Special Assistant*
*United States Attorney*

12 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

[Title omitted]

**Declaration of Taking—Filed December 13, 1944**

I, Philip B. Fleming, Federal Works Administrator of the Federal Works Agency of the United States of America, do hereby declare that:

1. (a) The perpetual easements in and to the lands described in Schedule "A" hereto attached are hereby taken for the use of the United States under the authority of the Act of August 1, 1888, 25 Stat. 357 (U.S.C. Title 40, Sec. 257); the Act of February 26, 1931, 46 Stat. 1421 (U.S.C. Title 40, Secs. 258(a) to 258(e)); the Act of October 14, 1940, as amended (U.S.C. Title 42, Secs. 1531 to 1564, inclusive), funds having been appropriated by the Act of July 3, 1941 (Public No. 150, 77th Congress). The public use for which said perpetual easements are taken is the provision of public works or equipment for public works, pursuant to said Act of October 14, 1940, as amended.

2. A description of said easement areas sufficient for the identification thereof is set forth in Schedule "A" annexed hereto and made a part hereof.

3. The estates or interests taken for said public use are perpetual easements in and to the lands described in Schedule "A" to locate, construct, operate, maintain, repair, replace and remove sewer pipe lines and appurtenances.

4. Plans (2) showing said easement areas are annexed hereto and made a part hereof.

13 5. The sum of money estimated by me to be just compensation for said perpetual easements is set forth in Schedule "A" annexed hereto and made a part hereof, which sum I herewith deposit in the registry of this Court to the use of the persons entitled thereto.

I am of the opinion that the ultimate award of compensation for the taking of said perpetual easements will be within any limits prescribed by law to be paid as the price therefor.

IN WITNESS WHEREOF, I, Philip B. Fleming, Federal Works Administrator, thereunto duly authorized have signed this Declaration of Taking, as Federal Works Administrator this 14th day of November, 1944, in the City of Washington, District of Columbia.

UNITED STATES OF AMERICA

By PHILIP B. FLEMING
*Federal Works Administrator*

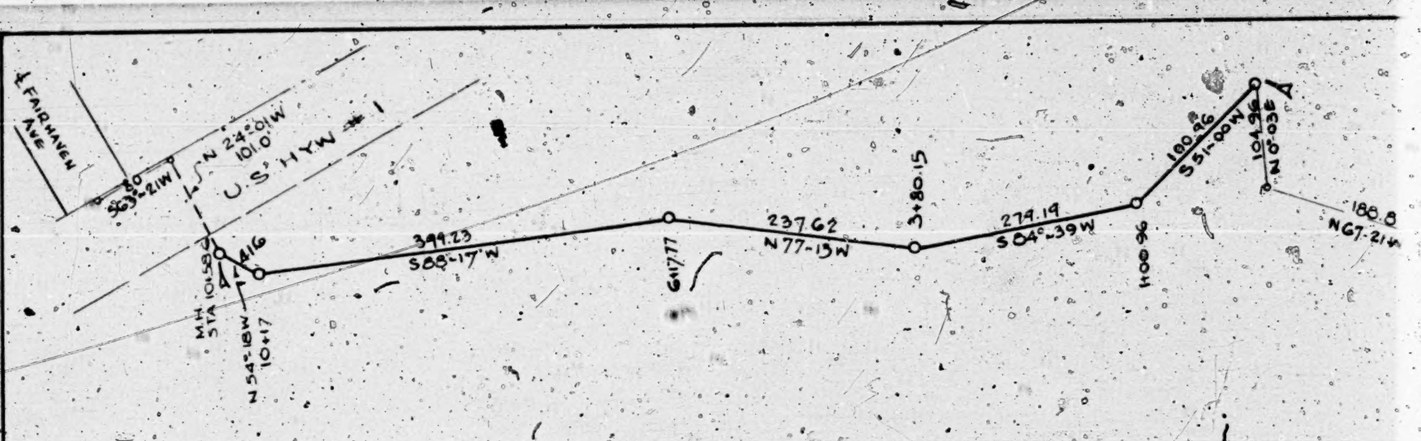
## SCHEDULE "A"

Perpetual easements in and to strips of land 10 feet in width lying and being in the County of Fairfax, Commonwealth of Virginia, to locate, construct, operate, maintain, repair, replace and remove sewer pipe lines and appurtenances, the center lines of said strips of land being particularly described as follows:

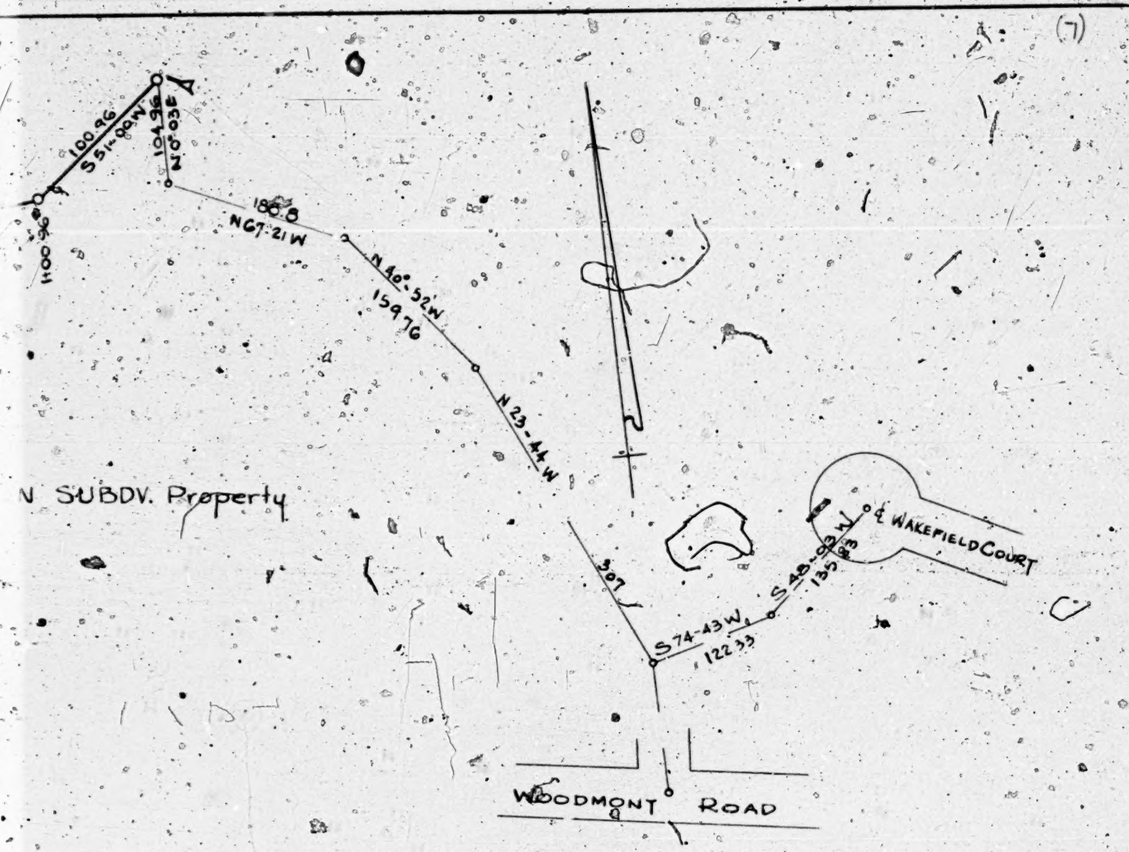
Purported Owner—Bell Haven Realty Corporation

. . . . . .

The total sum of money estimated by the acquiring authority to be just compensation for the aforesaid perpetual easements in this proceeding hereby taken is $2.00.




Contract 3-C (Station 0+0 – 10+58.8) is across BELLE HAVEN SUBDV. Property




N SUBDV. Property

RIGHT OF WAY MAP, CONTRACT 3C

THROUGH PROPERTY OF

**BELLE HAVEN, INC.**

FAIRFAX COUNTY, VA. OCT 1944

SCALE 1"=100'

Massey & Johnson

Fairfax, Va

CONTRACT 3C

TY OF

INC.

OCT 1944

on

Sta. 117+94.73

15TH STREET (UNDEVELOPED) (DEVELOPED)

N 13°-41' E 938.60 60

25

10' off ℄

BELLE HAVEN REALTY CORP ..... CORP .....

Sta. 108+56.13

43.13

N 40°-37' E

℄ STREET

℄ PLUS 108+13 BELLE HAVEN COUNTRY CLUB

Plat showing R.O.W. Taking Taking

STA 117+94.73 ~ STA. 108+13 108+13

THRU PROPERTY OF OF

BELLE HAVEN REALTY CORP Y CORP.

Fairfax County, Virginia, NOVEMBER, 1944 OVEMBER, 1944

SCALE 1" = 100'

MASSEY & JOHNSON

FAIRFAX, VIRGINIA

15A

45 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Amended Petition for Condemnation—Filed April 8, 1948**

To The Honorable Judge of Said Court:

Comes now the United States of America, the petitioner, upon leave of Court, and amends Paragraphs II and III of the original petition for condemnation, filed in this proceeding on December 13, 1944, to read as follows:

II.

That pursuant to this Act, the Honorable Philip B. Fleming, Administrator of the Federal Works Agency of the United States of America, has selected for acquisition by the United States of America perpetual easements in and to the property hereinafter described, to locate, construct, operate, maintain, repair, replace and remove sewer mains and their appurtenances in and to the street areas and privately owned lands, together with all right, title and interest in and to all sewer mains and their appurtenances presently constructed in the aforesaid street areas and privately owned lands, except sewer laterals constructed from improvements on lands abutting the aforesaid street areas and connected to said sewer mains, and has designated that the same are suitable and necessary for the purposes of the United States and that such selection and designation and determination have been and now are in full force and effect.

46 III.

That the perpetual easements in and to the following described street areas and privately owned lands are lying and being in Belle Haven Subdivision, Fairfax County, Virginia, and are more particularly described as follows:

. . . . . .

53 The other allegations contained in the original petition are prayed to be considered and made a part of this amended petition as though set out in full herein.

Your petitioner, therefore, prays that an order by this Court be made requiring all persons concerned to appear at the time

and place in such order to be named to make known their objections, if any they have, and their respective titles, claims, interests, or demands against said property, or improvements thereon, or any other matters material to their respective rights.

And your petitioner will ever pray.

UNITED STATES OF AMERICA

By GEORGE R. HUMRICKHOUSE
George R. Humrickhouse
*United States Attorney*

By A. CARTER WHITEHEAD
A. Carter Whitehead
*Special Assistant to the United States Attorney*

*Duly sworn to by A. Carter Whitehead, jurat omitted in printing.*

---

104 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Motion to Intervene as Defendants—Filed August 31, 1948**

The above-named applicants for intervention are owners in fee of property in the recorded subdivision of Belle Haven, Fairfax County, Virginia, and served by the sewer system title to which has been taken herein. They are also President, Vice-President and Secretary-Treasurer, respectively, of the Belle Haven Citizens' Association, Incorporated, which is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia, and the membership of which includes substantially all the property owners in the Belle Haven subdivision.

Applicants move for leave to intervene as defendants herein in order to request the limited relief set forth in their proposed answer, copy of which is attached hereto, on the ground that applicants, and the other members of the Belle Haven Citizens' Association, are so situated as to be adversely affected by the disposition
105 to be made of the property involved herein. The limited nature of the relief sought is such that the intervention will

not delay or prejudice the adjudication of the rights of the original parties.

J. BARTON PHILLIPS
J. Barton Phillips,
105 S. Royal Street,
Alexandria, Va.

FREDERICK A. BALLARD
Frederick A. Ballard,
912 American Security Bldg.,
Washington 5, D. C.
*Attorneys for Applicants for Intervention.*

---

Notice of Motion (omitted in printing)

---

106 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Answer of Interveners—Filed August 31, 1948**

1. Interveners and the other members of the Belle Haven Citizens' Association (hereinafter collectively referred to as the "interveners") are the owners in fee of property served by the sewer system described in the Second Amended Declaration of Taking herein. Interveners are the owners, in equity, of undivided, pro-rata fee interests in such sewer system, and also own perpetual easements to use such system. The equitable ownership interests in interveners result from the fact that interveners and their predecessors in interest paid for installation of the system as part of the purchase price of the individual lots in the Belle Haven subdivision; which purchase price was paid to defendant Belle Haven Realty Corporation, which developed said subdivision and installed the sewer system, progressively beginning in 1925. The
107 easements of user of such system, running with the title to all abutting property, were acquired by interveners and their predecessors in interest by grant from defendant Belle Haven Realty Corporation as former owner and as developer of the Belle Haven subdivision.

2. The sewer system here involved was maintained and operated by defendant, Belle Haven Realty Corporation, without charge to

the property owners in the Belle Hayen subdivision, pursuant to contracts of purchase of the individual lots, until 1944. In 1944 the petitioner, without the consent of interveners, their predecessors in interest, or the property owners generally, and without any determination of this or any other court, blocked off the outlets of such system and connected it to the outlets of a trunk sewer system constructed by the petitioner, acting through the Federal Works Agency, and operated by the Board of Supervisors of Fairfax County, Virginia (hereinafter called the "Supervisors"), pursuant to lease from petitioner. Said lease contains the following provision as to user charges to be imposed upon the users of the leased system:

> "5. In consideration of the foregoing, the Lessee covenants and agrees that following delivery to it of possession of the Leased Property: • • •
>
> "(d) It will operate the Leased Property and the sanitary sewerage facilities connected therewith which are operated by the Lessee on a revenue-producing basis and will maintain and collect reasonable rates and charges for the services rendered by the Leased Property and the sanitary sewerage facilities connected thereto, which rates and charges shall be satisfactory to the Government and shall be commensurate with the services rendered or to be rendered."

In accordance with the above provision in the lease, the petitioner, acting through the Federal Works Agency, fixed a user charge of two dollars per month to be assessed upon all users of said system; and the Supervisors thereupon undertook to assess such charge upon interveners and the other property owners in Belle Haven subdivision. Such charge was substantially in excess of the reasonable cost of maintenance and operation of the Belle Haven system itself, and included a substantial amount for
108 amortization of the capital cost of the trunk system.

Upon information and belief petitioner and the Supervisors still intend to assess a charge containing such a capital element.

3. Interveners do not claim herein any reimbursement for their equitable ownership interests in the Belle Haven sewer system. They are also willing to pay to the Supervisors the actual cost of maintenance and operation of that system, and in fact desire that the Supervisors operate the system upon that basis. They seek herein only a perpetual guarantee that they and all other property owners in the Belle Haven subdivision shall not be required to pay anything in addition to such actual cost of maintenance and operation, and specifically that they be not required to pay any amount

applicable to amortization of the cost of their own system, or of the trunk system (to which the Belle Haven system was forcibly connected by petitioner without their consent).

WHEREFORE, interveners pray:

1. That their attached motion for leave to intervene be granted.

2. That the Court include in its judgment herein the stipulation that no present or future owner of property in the recorded subdivision of Belle Haven, Fairfax County, Virginia, shall at any time be assessed by petitioner or any successor in interest, as a user charge, tax, or in any other manner, any amount in excess of the actual cost of maintenance and operation of the sewer system within the said subdivision, and specifically shall never be in any manner assessed or charged with any amount applicable to amortization of or reimbursement for the capital cost of such system, or of any other system (including the trunk system to which the Belle Haven system has been connected).

109 3. For such other and further relief as to the Court may seem proper.

J. BARTON PHILLIPS
J. Barton Phillips,
105 S. Royal Street,
Alexandria, Va.

FREDERICK A. BALLARD
Frederick A, Ballard,
912 American Security Bldg.,
Washington 5, D. C.
*Attorneys for Applicants for Intervention.*

---

Certificate of Service (omitted in printing)

---

122 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Motion to Intervene as Defendant—Filed October 28, 1948**

The above-named applicant petitions this Honorable Court for leave to intervene as defendant in the above-named pending legal proceedings in order to request the relief prayed for in applicant's proposed answer, copy of which is attached, on the ground that

representation of the applicant's interest by existing parties to the proceeding is or may be inadequate and the applicant will be bound by a judgment in the action.

Applicant is the joint owner with his wife Treva G. Cunningham in fee of Lots 29 and 30, Block 1, Section 1 of the Subdivision of Belle Haven, Fairfax County, Virginia, and is served by the Belle Haven sewer system, a wholly self-contained and fully operating sewer system except as interferred with by Petitioner's unauthorized connections to its trunk-line system of the two outfalls of the Belle Haven system, title to which complete system of Belle Haven sewers Petitioner now seeks to acquire through condemnation proceedings instituted in the above entitled cause of action.

123 Applicant is privileged to direct the Court's attention to certain named other individual property owners in the Belle Haven subdivision served by said Belle Haven sewer system who by their signatures affixed hereto have indicated their concern in the matter pending before the Court and concur in this motion to intervene. The nature of the relief sought will not unduly delay or prejudice the adjudication of the original parties to the proceedings.

HARRY E. CUNNINGHAM
Harry E. Cunningham
12 Woodmont Road, Belle Haven
Alexandria, Virginia

---

Notice of Motion (omitted in printing)

---

124 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Amended Motion to Intervene as Defendant—Filed October 28, 1948**

The original motion to intervene filed by the above-named applicant in the above named proceedings is hereby amended for the purpose of presenting to the Court, as Exhibits A and B, copies of Deed of Bargain and Sale dated June 8, 1935, for Lot 29 from Leon J. and Thelma B. Peplinski to H. E. and Treva Graves Cunningham, and Deed of Bargain and Sale dated September 3, 1935, for Lot 30 from the Belle Haven Realty Corporation to H. E.

and Treva Graves Cunningham, referred to by recital in the aforementioned original motion.

In other respects the original motion as filed with the Court is unchanged.

HARRY E. CUNNINGHAM
Harry E. Cunningham
12 Woodmont Road, Belle Haven
Alexandria, Virginia

Copies sent by mail to United States Attorney and the Attorney for Belle Haven Realty Corporation, October 28, 1948.

HARRY E. CUNNINGHAM
Harry E. Cunningham

125

**Exhibit A**

THIS DEED, made this 8th day of June, 1935, between LEON J. PEPLINSKI and THELMA B. PEPLINSKI, his wife, parties of the first part and H. E. CUNNINGHAM and TREVA GRAVES CUNNINGHAM, his wife, as joint tenants with the full common law rights of survivorship, parties of the second part.

WITNESSETH, that in consideration of the sum of TEN DOLLARS and of other good, valuable and sufficient consideration in law, the receipt of which are hereby acknowledged, the said parties of the first part do hereby grant, bargain, sell and convey, with general warranty of title, unto the said parties of the second part, as joint tenants with the full common law rights of survivorship, all that certain lot or parcel of ground, together with all the improvements thereon and appurtenances to the same in any wise belonging, situated in Mount Vernon Magisterial District, Fairfax County, Virginia, and designated and know as follows, to wit:

> Lot numbered 29, in block numbered 1, section numbered 1, of the Subdivision of Belle Haven, as the same is duly dedicated, platted and recorded by deed recorded in Deed Book N #9, page 18, et seq., of the Fairfax County Land Records.
>
> It is the same property that was conveyed to the said Leon J. Peplinski by deed recorded in Deed Book V #9, page 291, of the Fairfax County Land Records.

THE SAID PARTIES OF THE FIRST PART covenant that they have the right to convey the said property to the said grantees; that they have done no act to encumber the said property; that they, the said parties of the second part, shall have quiet enjoyment of said property, free from the claims of all persons whomsoever; and that

they, the said parties of the first part will execute such further assurances of the said property as may be requisite.

Witness the following signatures and seals:

/s/ LEON J. PEPLINSKI (SEAL)

/s/ THELMA B. PEPLINSKI (SEAL)

126 STATE OF VIRGINIA }
CITY OF ALEXANDRIA }

I, Virginia R. Kane, a Notary Public for the City aforesaid, in the State of Virginia, do certify that Leon J. Peplinski and Thelma B Peplinski, his wife, whose names are signed to the writing hereto annexed, bearing date on the 8th day of June, 1935, have acknowledged the same before me in my City aforesaid.

GIVEN UNDER MY HAND, this 11th day of June, 1935.
My commission expires on the 31st day of August 1937.
I was commissioned as Virginia Reveley

/s/ VIRGINIA R. KANE
*Notary Public*

I hereby certify that this is a true copy of the original.
H. E. CUNNINGHAM

127 **Exhibit B**

THIS DEED, made this 3rd day of September, 1935, between the BELLE HAVEN REALTY CORPORATION, a corporation chartered, organized and existing under the laws of the State of Virginia, party of the first part and H. E. CUNNINGHAM and TREYA GRAVES CUNNINGHAM, his wife, as joint tenants with the full common law rights of survivorship, parties of the second part.

WITNESSETH, that in consideration of the sum of TEN DOLLARS and of other good, valuable and sufficient consideration in law, the receipt of which are hereby acknowledged, the said party of the first part doth hereby grant, bargain, sell and convey, with general warranty of title, unto the said parties of the second part, as joint tenants with the full common law rights of survivorship, all that certain lot or parcel of ground, together with any improvements thereon and appurtenances to the same in any wise belonging, situated in Mount Vernon Magisterial District, Fairfax County, Virginia, and designated and know as follows, to wit:

Lot numbered 30, in Block number 1, Section numbered 1, of the Subdivision of Belle Haven, as the same is duly dedicated, platted and recorded by deed recorded in Deed Book N #9, page 18 et seq., of the Fairfax County Land Records.

A right of way 5 feet wide over and along the rear and side lines of the above described property is hereby reserved for the construction, maintenance and repair of poles and wires and the transmission of Electric and Telephone service, water, sewer, drainage and other pipes and conduits.

It is part of the same property that was conveyed to the said party of the first part by deed recorded in Deed Book K #9, page 587 of the Fairfax County Land Records.

SUBJECT, however, to certain conditions and restrictions set forth in the deed of Dedication in Deed Book N #9, page 18 et seq., of the Fairfax County Land Records, which conditions and restrictions shall operate as covenants running with the title.

The said party of the first part covenants that it has the right to convey the said property to the said grantees; that it has done no act to encumber the said property; that they, the said parties of the second part, shall have quiet enjoyment of said property, free from the claims of all persons whomsoever; and that it, the said party of the first part, will execute such further assurances of said property as may be requisite.

128 IN WITNESS WHEREOF, the said BELLE HAVEN REALTY CORPORATION has caused these presents to be signed by its president and its seal to be hereto affixed, attested by the Secretary on the day and year first hereinbefore written.

BELLE HAVEN REALTY CORPORATION
By: /s/ CLARENCE J. ROBINSON
*President*

ATTEST:

/s/ JULIAN T. BURKE
*Secretary*

STATE OF VIRGINIA
CITY OF ALEXANDRIA } to-wit:

I, James R. Caton, Jr., a Commissioner in Chancery in and for the Circuit Court of the City of Alexandria, State of Virginia, do hereby certify that Clarence J. Robinson, the President and Julian T. Burke, the Secretary of the BELLE HAVEN REALTY CORPORATION, whose names are signed to the writing foregoing and hereto annexed, bearing date on the 3rd day of September, 1935, personally appeared before me in my City aforesaid and acknowledged the said writing to be the act and deed of the said corporation and the seal thereto affixed to be its corporate seal and that said deed was so

signed and acknowledged by them and the said seal so affixed by authority of the Board of Directors of the Corporation.

GIVEN under my hand this 23rd day of October, 1935

/s/ JAMES R. CATON, JR.
*Commissioner in Chancery.*

I hereby certify that this is a true copy of the original.

H. E. CUNNINGHAM

---

134 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Memorandum of Opinion—Filed November 4, 1948**

Since hearing argument on the motions for intervention filed by certain property owners in the Belle Haven Subdivision, I have given the questions presented considerable thought and study. It is my conclusion that the individuals who purchased lots from the Belle Haven Corporation in its subdivision acquired easements in and to the sewer system, although no specific mention of any such easement was mentioned in either the deeds of conveyance or the contract of purchase.

In my opinion, these easements might properly be termed "easements by implication" or "by implied grant", although possibly they might come within the category of "easements by
135 estoppel" or "easements of necessity".

In discussing "easements by implied grant", Mr. Minor states (I Minor on Real Property 124) that the foundation principle upon which rests the creation of easements by implied grant, is that a grant of land carries with it by implication as incident thereto everything reasonably necessary to the enjoyment of the thing granted which it is in the power of the grantor to bestow. On this subject, Mr. Minor continues as follows:

"Sec. 104. Same-B. *Quasi Easements Converted into Easements.*

"We have seen that while no one can have a real easement in *his own land*, he may be accustomed to utilize part of his land for the benefit of another part, thereby creating a relation between the two parts, which may be termed a *quasi* easement, which, however, constitutes no real interest separate and apart

from his *general ownership* of both tracts, and his consequent right to use either as he sees fit.

"But upon the same principle adverted to as the foundation of easements by *implied grant* generally, namely, that where one grants land he is presumed to pass all in his power to confer that is *reasonably necessary* to the enjoyment of the land granted, if the owner of the two tracts should convey the *quasi dominant* tenement, retaining the *quasi servient* tract, the grant of the former carries with it by *implication* the right to the continued use of the servient tract, as it had been previously used. But this is subject to the qualification, at least where the *servient* estate subsequently or simultaneously comes into possession of some one *other than the original owner*, that the *quasi* easement is (1) apparent, (2) continuous, and (3) *reasonably necessary* to the enjoyment of the dominant tract.

"Thus, in Sanderlin v. Baxter, two estates, 'Woodlawn' and 'Fairfield', separated only by a public road, were both owned by W., who drained Woodlawn by ditches through Fairfield to the river. In 1811, W. granted Woodlawn to A. (under whom the plaintiff claimed) and in 1820 he devised Fairfield to D. (under whom the defendant claimed). The deed and will were both silent about the drainage; but at the time Woodlawn was conveyed these draining ditches were *open* and *visible*, operating regularly and *continuously*, and were then, as they continued to be, *necessary* for the *convenient* and *beneficial* use and enjoyment of Woodlawn, for which purpose they were continuously used down to 1878, when they were *obstructed* by Sanderlin, the then owner of Fairfield. Thereupon, Baxter, the owner of Woodlawn, enjoined Sanderlin from obstructing the ditches, and the injunction was made perpetual.

136 "On the other hand, in Scott v. Beutel, a like relief was denied because the easement claimed was not *obvious and apparent*, nor known to the purchaser to exist at the time of the purchase.

"In Paine v. Chandler, pipes for the *supply of water* were laid through one tract to another, both tracts at the time belonging to the same owner, but the ownership later became separated; and it was held that the easement, being apparent, continuous and necessary, passed with the transfer of the dominant tract."

It also seems to me that Section 5168 of the present Code of Virginia, which was Section 2443 of the Code of 1887, has some significance. This section is as follows:

> "*Appurtenances, etc., included in deed of land.*
> Every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges and appurtenances of every kind belonging to the lands therein embraced."

I have also considered the rather full discussion of "Creation of Easements by Implication" in *Restatement of the Law—Property—Division V—Servitudes,* beginning at page 475, and it seems to me that the principles there enunciated support the conclusion which I have reached here.

The case of *Oney* v. *West Buena Vista Land Company, etc.* 104 Va. 580, seems to me to be quite analogous to the situation presented here. In that case, the facts were that during the boom period of the 90's, defendant land company subdivided a tract of land west of Buena Vista, showing on its plat a bridge to be constructed across the river connecting the prospective development with the Town of Buena Vista. This plat was recorded and the bridge was actually built. While the bridge was being built, plaintiff bought land in the deveopment at a price about twice as much as the property was worth in the absence of a bridge. Although the deed to the plaintiff referred to the plat and the plat showed the bridge, no reference to the bridge was made in
137 the deed to the plaintiff, and of course no easement was specifically granted him. However, the court held that "the law implies a grant of the bridge as an easement to the property conveyed."

In the light of the above and other authorities, I am of the opinion that the Belle Haven property owners acquired easements in the sewer system as it existed at the time of their purchases. Inasmuch as the Government's taking has deprived them of their easements, I am of the opinion that they are entitled to intervene and assert their claims for just compensation. I am not at this time passing on any questions of how just compensation should be arrived at, or whether or not intervenors have any rights to impose any limitation on the Government's taking in lieu of just compensation.

A. W. BARKSDALE
*United States District Judge.*

138 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Order Granting Leave to Intervene—Filed November 4, 1948**

Upon the motion filed August 31, 1948, and supplemental motion filed November 1, 1948, of W. Ralph Davis, Frank A. Leamy and Margaret M. Boothe, individually, and as officers of Belle Haven Citizens Association, a corporation, for leave to intervene in this action, and upon the motion and amended motion tendered on October 28, 1948, of Harry E. Cunningham, for leave to intervene in this action, and the answers of the said petitioners proferred with their said motions, argument in support of and in opposition to said motions having been heard by the court on October 28, 1948, upon consideration whereof, the court being of the opinion, for

139 reasons set out in a Memorandum filed herewith, that, taking the factual allegations of the said motions and proferred answers as true, petitioners had property rights by way of easements appurtenant in and to the Belle Haven sewer system which is the subject matter of this action, and therefore have a right to intervene and assert their claims for just compensation, it is so adjudged. It is therefore

ORDERED

that the motions of the above-named parties for leave to intervene be, and they are, hereby granted; and it is further

ORDERED

that the answers proferred by the said parties be, and they are, hereby filed, without prejudice, however, to the right of the United States of America or any other party hereto to move to strike out said answers, or any part thereof, should the United States of America or any other party hereto be so advised: to which action of the court in granting the said motions for intervention, the United States of America, by counsel, objected and excepted for reasons fully stated to the court.

And it is further

ORDERED

that the Clerk mail certified copies of this order, and uncertified copies of the court's Memorandum, to A. Carter Whitehead, Esq., Special Assistant to the United States Attorney, Richmond, Va., J. Randall Caton, Jr., Esq., Attorney at Law, Alexandria, Va.,

J. Barton Phillips, Esq., Attorney at Law, 108 N. St. Asaph St., Alexandria, Va., Frederick A. Ballard, Esq., Attorney at Law, 912 American Security Bldg., Washington-5, D. C., and Mr. Harry E. Cunningham, 12 Woodmont Road, Belle Haven, Alexandria, Va.

Enter:

A. W. BARKSDALE
*United States District Judge.*

---

171 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Motion for Temporary Injunction—Filed February 11, 1950**

W. Ralph Davis, Frank A. Leamy, and Margaret M. Boothe, interveners herein, move the Court for an order enjoining petitioner from collecting or asserting the right to collect, by sending bills or otherwise, charges for the use of the sewer system in Belle Haven subdivision, either directly or through any agent or lessee (including the Board of Supervisors of the County of Fairfax, Virginia, as lessee), pending determination by this Court of the just compensation to which the property owners in Belle Haven are entitled herein; and directing the recall of bills sent on or about January 1, 1950. The grounds for this motion are:

1. The Belle Haven sewer system, which has been taken by petitioner, has since March 4, 1949, been operated under a lease from petitioner by "The Board of Supervisors of Fairfax County, Virginia, acting for and in Behalf of Sanitary District No.
172 1, Fairfax County, Virginia" (hereinafter referred to as "Fairfax County"). On or about January 1, 1950, bills for the use of the sewer system (for the first quarter of 1950) were sent by Fairfax County to the property owners in Belle Haven. The charge contained in the bills is $2.00 per month, which is the same amount charged generally to users of the trunk sewer system to which the Belle Haven system was connected. This charge is alleged in the uncontroverted answer (par. 2) filed herein by these interveners to be "substantially in excess of the reasonable cost of maintenance and operation of the Belle Haven system itself, and included a substantial amount for amortization of the captial cost of the trunk system". As also alleged in the answer filed by these interveners (par. 2), the Belle Haven system was connected to the trunk system, prior to the taking herein, "without the consent of interveners, their predecessors in interest, or the property owners generally, and without any determination of this or any other court * * *".

As further alleged in said answer (par 2) petitioner under its lease to Fairfax County controls the amount of the charge to be made.

2. On November 4, 1948, this Court granted the motion of these interveners to intervene as defendants herein, and held that they and the property owners whom they represent had easements in the Belle Haven sewer system which were taken by petitioner.

3. The answer filed herein by these interveners waives monetary damages for their easements and claims as the just compensation to which they are entitled a reasonable limitation upon the amount which they can be charged by petitioner (and those claiming under it) for the use of their own system. Specifically, their answer
173 asks that they be protected against forcibly contributing toward the amortization of the capital cost of the trunk system to which the Belle Haven system was connected by petitioner but from which Belle Haven users derive no benefit. Accordingly, the question of "just compensation" for the taking of the Belle Haven system, which is now pending before this Court, directly involves the *amount* which can lawfully be charged in the future for the use of the system. Nevertheless, petitioner and its lessee, Fairfax County, have now attempted to decide for themselves, without awaiting the decision of this Court, the amount of the charge to be made.

4. Interveners and those whom they represent will be irreparably damaged if the current bills are not recalled, and future bills enjoined (pending decision herein) since the bills represent a cloud upon the title to the properties involved, chapter 161 of the Acts of Assembly of 1926, as amended by the Act of March 4, 1948 (Acts of Assembly of 1948, chap. 94), section 3(e); and there is no provision of law requiring refund of overpaid charges of this category.

ANDREW A. CLARKE
108 N. Fairfax Street,
Alexandria, Virginia

JOSEPH W. WYATT
Joseph W. Wyatt,
Tower Building,
Washington, D. C.

FREDERICK A. BALLARD
Frederick A. Ballard,
American Security Building,
Washington, D. C.
*Attorneys for Interveners.*

174 Notice of Motion (omitted in printing)

---

Certificate of Service (omitted in printing)

---

184 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Government's Motion to Strike etc.—Filed March 22, 1950**

Comes now the United States of America by its attorney, and moves the court to strike from the answers of the intervenors filed in this proceeding such portions thereof as deal with the Government's use of the property taken in this proceeding, and particularly the second prayer of the intervenors' petition.

A. CARTER WHITEHEAD
*Special Assistant to the*
*United States Attorney.*

---

185 (File endorsement omitted)

IN UNITED STATES DISTRICT COURT

(Title omitted)

**Memorandum of Opinion—Filed March 29, 1950**

STATEMENT OF THE CASE.

Some years ago, probably beginning as early as 1925, Belle Haven Realty Corporation began the development of a residential subdivision in Fairfax County near the City of Alexandria. In the development, streets and lots were laid off, and a complete and adequate sewer system was installed. From time to time, lots were sold to individuals who built residences. The cost of the installation of the sewer system was prorated, and a proportionate part of such cost was included in the price paid by the purchasers of the lots. In their conveyances of lots to purchasers, Belle Haven Realty Corporation did not specifically mention the sewer
186 system, but did include in the conveyances a grant of "all appurtenances to the same and in any wise belonging",

As houses were built, they were connected to the sewer system, and no charge for the use of the system was made against the property owners.

In this proceeding, instituted on December 13, 1944, the United States of America, on behalf of the Federal Works Agency, has condemned and taken the entire Belle Haven sewer system, and has connected it, at least in part, to a trunk line sewer which replaces at least one of the original out-falls. This taking was without objection, and without claim for compensation on the part of Belle Haven Realty Corporation. Apparently, it was the thought of both the Belle Haven Realty Corporation and the Government that the individual property owners had no rights or interest in the sewer system. Subsequent to the taking of the sewer system, it has been leased to, and operated by, the Board of Supervisors of Fairfax County, Virginia, acting for and in behalf of Sanitary District No. 1, Fairfax County, Virginia. Beginning January 1, 1950, the Board of Supervisors of Fairfax County began sending monthly bills to the Belle Haven householders in the amount of $2.00 each as a sewer service charge, which amount, according to the allegations of certain Belle Haven householders, covers not only the cost of maintenance and operation of the Belle Haven sewer system, but also includes an amount for the amortization of the costs of installation of the trunk line sewer to which the Government has connected the Belle Haven system.

In the Fall of 1948, certain of the Belle Haven property owners filed petitions to intervene herein, alleging that the Belle Haven property owners owned the Belle Haven sewer system, or at least had rights therein which had been taken by the Government without payment of compensation therefor. In their answers which they sought to file, petitioning property owners waived all claims to monetary compensation on condition that, in lieu of monetary compensation, the court include in the judgment of taking a stipulation or limitation that no present or future Belle Haven
187 property owner be assessed by the Government, or any successors in interest, as a user charge, tax, or in any other manner, any amount in excess of the actual costs of maintenance and operation of the sewer system within the said subdivision, and specifically, that such property owners never be in any manner assessed or charged with any amount for amortization of the trunk line sewer to which the Belle Haven system has been connected. As to these petitions, the Government took the position that the property owners had no rights or interests in the sewer system, and objected to intervention by the petitioning property holders. After a hearing, I reached the conclusion, as set out in a memorandum filed herein on November 4, 1948, that the property owners did have "property rights by way of easements appurte-

nant in and to the Belle Haven sewer system", and therefore had the right to intervene and assert their rights to just compensation by reason of the taking of such rights by petitioner. I did not at that time pass on the question of whether or not the court might grant intervenors' petition for a limitation on the charges which might be assessed against them in lieu of monetary compensation. No further action was taken herein until February 11, 1950, when certain intervenors filed their motion for a temporary injunction, asking the court to enjoin petitioner and its agents and lessees from collecting, or asserting the right to collect, any charges for the use of the Belle Haven sewer system until the court had determined the question of just compensation raised by their answers. A hearing was held on intervenors' motion for a preliminary injunction at Alexandria on March 22, 1950, during the course of which hearing, petitioner, by counsel, filed its motion to strike out of intervenors' answer their claim for a limitation of user charge as just compensation in lieu of monetary damages. Time was allowed intervenors within which to file a memorandum in opposition to the Government's motion, and such memorandum has now been filed and considered. Intervenors' motion for a pre-
188 liminary injunction was taken under advisement pending a decision on the Government's motion.

## Discussion of the Question Involved.

In this proceeding, without objection, the Government has already taken the entire Belle Haven sewer system. The Government now vigorously opposes the imposition of any limitation upon its use of the sewer system, or the imposition of any limitation upon it or its lessee of the charges which may be made for the use of the sewer system. Inasmuch as it is obvious from what has taken place that the Government took this sewer system for the purpose of maintaining it and integrating it with more comprehensive sewer facilities, it does not seem to me inappropriate, from a common sense viewpoint, that the Belle Haven property owners be compensated for the taking of their easements of user by the grant of a continued right of user, the charge for such user being limited to the costs of maintenance of the Belle Haven sewer system. However, here, the Government has taken the entire sewer system in fee, opposes any diminution of its taking, and asserts that nothing less than the fee would be sufficient for its purposes. Under these circumstances, I have reached the conclusion that the court has no power to reduce, by limitation or otherwise, the estate and title taken by the Government.

As was said in *Shoemaker* v. *United States*, 147 U. S. 282, 298:

> "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use; yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be paid."

189 See also *United States* v. *Gettysburg &c. Co.*, 160 U. S. 668, 685. In other words, it seems to me to be the law that it is beyond the judicial function to determine that a fee simple, subject to an easement, is sufficient for the Government's purposes, when the Government, in carrying out legislative purposes, asserts that nothing less than the fee simple would be adequate.

See *Roanoke City* v. *Burkowitz*, 80 Va. 616, 623:

> "The view thus expressed is fully supported by the adjudged cases, which hold that the question as to the degree or quantity of interest to be taken is, like other political questions, exclusively for the legislature; and that when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. *De Varaigne* v. *Fox*, 2 Blatchf. 95; *People* v. *Smith*, 21 N. Y. 595; *Boom Company* v. *Patterson*, 98 U. S. 403; *United States* v. *Jones*, 109 Id. 513; *Beekman* v. *S. S. R. R. Co.*, 3 Paige 45; S. C., 22 Am. Dec. 679, and cases cited in the note, p. 692."

It is well settled that just compensation means the equivalent in money of the property taken. See *United States* v. *Miller*, 317 U. S. 369, wherein it is said (p. 373):

> "The Fifth Amendment to the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

It is true that there are instances to be found in the reported cases, where property owners have been compensated in media other than money. *Jefferson County* v. *Tennessee Valley Authority*, 146 F. (2d) 564. See also *Kansas City* v. *Napiecek*, 76 Kan. 693, 92 Pac. 827; *Morris* v. *The Boston & Maine Railroad*, 2

Cush. (Mass.) 536, 2 Lewis on Eminent Domain (3rd ed.), paragraph 756 (paragraph 505 of 2nd edition), p. 1343. However, it appears that in all these instances, which I have been able to find, where compensation other than money was awarded, it was by consent of the parties.

In the paragraph in Lewis on Eminent Domain cited above, it is said:

> "The commissioners or other tribunal to assess damages have no authority to give compensation in anything but money. It is erroneous, therefore, for them in their award
> 190 to reserve to the owner certain easements or privileges in the property condemned, such as the right to construct a way over it or drains through it, or the right to leave buildings or parts of buildings standing thereon and use them as before. So it is erroneous for the tribunal to award that the party condemning shall do certain things for the benefit of the owner, and to reduce the damages accordingly."

At the very end of the paragraph, it is pointed out that, although an owner is not bound to accept licenses and privileges to go upon and use the property taken, parties, by consent, may ratify such provisions in such a way as to make binding contracts between them, capable of being enforced in the usual way. But it is also pointed out that where the statute vests a fee in the party condemning, and the award reserves an easement to the owner, such an award would be void as repugnant to the legal effect of the condemnation.

It is therefore my conclusion that this court has no power, in awarding just compensation to the intervening Belle Haven property holders, to reduce the fee simple taken by the Government by imposing easements thereon or limitations on the use of the property taken by the Government.

An order will therefore be entered granting the Government's motion to strike, and allowing intervenors thirty days within which to amend their answers, should they be so advised. Intervenors' motion for a preliminary injunction will be denied.

A. W. BARKSDALE
A. W. Barksdale
*United States District Judge.*

(File endorsement omitted)

191 IN UNITED STATES DISTRICT COURT

March 30, 1950.

(Title omitted)

**Order—Filed March 29, 1950**

Upon the motion of W. Ralph Davis, Frank A. Leamy and Margaret M. Boothe, intervenors herein, for a temporary injunction, filed herein on February 11, 1950, this action came on to be heard and was argued by counsel at Alexandria on March 22, 1950, and during the course of said argument, petitioner, the United States of America, by counsel, indicating its desire to file its motion to strike certain matter from intervenors' answers, leave to file such motion was granted, and the United States of America, by counsel, filed in writing herein its motion to strike from the answers of the intervenors filed in this proceeding such portions thereof as deal with the Government's use of the property
192 taken in this proceeding, and particularly the second prayer of the intervenors' answers, and the court not being fully advised of its judgment, and counsel for intervenors desiring time within which to file a memorandum in opposition to petitioner's said motion, the court took time to consider and allowed intervenors' counsel five days within which to file their memorandum.

Counsel for intervenors having now filed their memorandum in opposition to petitioner's motion to strike, and the court, having maturely considered the issues presented, being of the opinion, for reasons set out in a memorandum filed herewith, that petitioner's motion to strike is well grounded, it is so adjudged. It is therefore

ORDERED

that petitioner's motion, filed herein on March 22, 1950, to strike from the answers of the intervenors filed in this proceeding such portions thereof as deal with the Government's use of the property taken in this proceeding, and particularly the second prayer thereof, be, and the same is, hereby granted, and the matters referred to in said petition be, and they are, hereby stricken from intervenors' answers.

And it further appearing to the court that the grounds of intervenors' motion for a preliminary injunction are not well taken, inasmuch as the court has heretofore herein stricken from the intervenors' answers their prayer for limitation of user charges to be required of them for the use of the sewer system heretofore taken by petitioner herein, it is therefore

ORDERED

that the intervenors' motion for a temporary injunction be, and the same is, hereby denied.

And it is further

ORDERED

that intervenors be, and they hereby are, allowed thirty days
193 from this date within which to amend their answers should they be so advised.

And it is further

ORDERED

that the Clerk certify and mail copies of this order, together with uncertified copies of the Court's Memorandum of Opinion this day filed, to A. Carter Whitehead, Esq., Special Assistant to the United States Attorney, Richmond, Virginia, Frederick A. Ballard, Esq., American Security Building, Washington, D. C., Andrew W. Clarke, Esq., 100 N. Fairfax Street, Alexandria, Va., J. Randall Caton, Esq., Attorney at Law, Alexandria, Virginia, and Mr. Harry E. Cunningham, 12 Woodmont Road, Belle Haven, Alexandria, Virginia.

Enter:

A. W. BARKSDALE
*United States District Judge.*

---

(File endorsement omitted)

199 IN UNITED STATES DISTRICT COURT

(Title omitted)

**Amended Answer of Intervening Defendants—Filed April 28, 1950**

1. The intervening defendants are owners in fee of property served by the Belle Haven sewer system described in the Second Amended Declaration of Taking. This answer is filed in behalf of all such property owners except any who have filed or may file separate answers. The property owners in whose behalf this answer is filed (including the named intervening defendants) are hereinafter collectively referred to as the "defendants".

2. Defendants are the owners in equity of undivided, pro-rata fee interests in the Belle Haven sewer system, and also own appurtenant easements to use such system. The equitable owner-

ship interests in defendants result from grant and release by the former owner of the sewer system, defendant Belle Haven Realty Corporation, and from the fact that defendants and their predecessors in interest paid for the installation of the system as part of the purchase price of the individual lots in the Belle
200 Haven subdivision. This purchase price was paid to defendant Belle Haven Realty Corporation, which developed said subdivision and installed the sewer system, progressively, beginning in 1925. The easements of user of such system, running with the title to all abutting property, were acquired by defendants and their predecessors in interest by grant from defendant Belle Haven Realty Corporation as former owner and developer of the Belle Haven subdivision.

3. The sewer system here involved was maintained and operated by defendant, Belle Haven Realty Corporation, without charge to the property owners in the Belle Haven subdivision, pursuant to contracts of purchase of the individual lots, until 1944. During 1944 (the exact date not being known to defendants) petitioner, without the consent of defendants or their predecessors in interest, and without any determination of this or any other court, blocked off the outlets of such system and connected it to a trunk sewer system constructed by petitioner, acting through the Federal Works Agency, and operated by the Board of Supervisors of Fairfax County, Virginia (hereinafter called "Fairfax County") pursuant to lease from petitioner. On March 4, 1949, the Belle Haven system was covered under such lease and has since that date been operated thereunder.

4. Petitioner has contracted to sell to Fairfax County the trunk system, together with the Belle Haven system, and payments on the agreed purchase price are currently being made. The purpose of petitioner in condemning the Belle Haven system was and is to transfer such system to Fairfax County. The Belle Haven system was, prior to 1944, entirely separate and independent of the trunk system, and unrelated thereto. It was in no way necessary for the construction or operation of the trunk system to con-
201 nect it to the Belle Haven system. No public use of petitioner was or will be served by the taking of the Belle Haven system.

5. The taking of the Belle Haven sewer system was not authorized by any statute of the United States. Specifically it was not authorized under any of the acts relied upon by petitioner in its Second Amended Declaration of Taking, including the Lanham Act (Act of October 14, 1940, as amended, U.S.C. sec. 1531-1564), for the reasons, among others, that that act does not authorize the

taking over as a going concern, of properties, real and personal, of a privately owned public utility; that the President has made no finding, as required by section 202 of the Lanham Act, with respect to an "acute shortage" in Belle Haven "of public works * * * necessary to the health, safety, or welfare of persons engaged in national defense activities * * *"; and that the President has not approved, as further required by said section, the taking of the Belle Haven system as a method of relieving "such shortage" of public works, if any existed in Belle Haven.

6. The Belle Haven sewer system, prior to the interference with it by petitioner in 1944, was a completely integrated system, with its own independent outlets into the Potomac River. Defendants derive no benefit whatsoever from the trunk system to which the Belle Haven system was forcibly connected by petitioner.

WHEREFORE, defendants pray:

1. That petitioner be ordered to restore forthwith the Belle Haven sewer system to its condition prior to its alteration and connection to petitioner's trunk system during 1944, and thereupon to return the Belle Haven system to the possession of defendants;

202 2. That if the taking be approved by this court, defendants and all property owners on whose behalf this amended answer is filed be severally awarded just compensation for the taking of the Belle Haven sewer system.

3. For such other and further relief as to the court may seem proper.

J. BARTON PHILLIPS, F.A.B.,
J. Barton Phillips,
108 N. St. Asaph Street,
Alexandria, Va.
JOSEPH W. WYATT, F.A.B.,
Joseph W. Wyatt,
Tower Building,
Washington, D. C.
FREDERICK A. BALLARD,
American Security Building,
Washington, D. C.
*Attorneys for Intervening Defendants.*

---

Certificate of Service (Omitted in printing)

(File endorsement omitted)

203 IN UNITED STATES DISTRICT COURT

(Title omitted)

**Answer of Belle Haven Realty Corporation—Filed December 15, 1950**

For answer to the proceedings herein, the Belle Haven Realty Corporation states as follows:

1. That it is a corporation organized and existing under the laws of the State of Virginia; that it has its principal office at No. 111 South Fairfax Street in the City of Alexandria in said State; that it developed the recorded subdivision of Belle Haven, a subdivision situated in the County of Fairfax immediately to the south of Hunting Creek, bounded on the east by Fort Hunt Road and on the west by the Richmond Washington Highway, known as U. S. No. 1; that it installed the sewer system located therein progressively, beginning in the year 1925.

2. The cost of installing said system was added by the said defendant proratably to the purchase price of the individual lots which were sold to the present owners in Belle Haven or their predecessors in title.

3. Subject to whatever equitable interest which may be adjudged to be in the respective property owners in the Belle Haven subdivision, this defendant is the legal owner, in fee simple, of
204 the sewer system serving the said subdivision of Belle Haven, together with the easements and rights over which various portions of the sewer system are installed, as described in the second amended Declaration of Taking herein.

4. This defendant claims as just compensation for the taking herein the present reproduction cost of such system, less depreciation, however, as of the date of the taking herein, or April 8, 1948, together with interest as provided by law.

5. For further answer, this said defendant, by way of review, states that in the spring of 1943, a Mr. Massey, Engineer of the government project, requested that the defendant corporation permit a sewer line from the subdivision of Fair Haven, a government financed project, and from the Anti-Aircraft Battery at Mt. Eagle, to be connected with our trunk line sewer extending along the Richmond Highway, thus saving the government the cost of building a line from these two projects along the western side of said highway to connect with the trunk line sewer then being constructed by the government under his supervision; that upon this

defendant's refusal to accede to this request, this defendant was advised by attorneys representing the Department of Justice and F. W. A. that it was the purpose of the government to condemn not only this outlet line, but an easement over property extending from the Belle Haven Country Club to the Belle Haven Road; that out of these discussions there arose an agreement that this defendant would accept nominal damages of $1.00 provided that the entire system in Belle Haven be taken, including all laterals, and that in the final order it be provided that there be no maintenance, operation, construction, re-construction, replacements, or assessment charges against any lot, lots or parts of lots within the recorded subdiviison of Belle Haven made and recorded prior to January 1, 1943; that there be no maintenance, operation, construction, reconstruction, replacements, or assessment charges against any lots to be created abutting or being sewered into those sewers now built and existing in easements, dedicated streets, or proposed streets either in Belle Haven or New Alexandria as shown on plat prepared by Massey and Johnson January 16, 1943.

This defendant further states that throughout these proceedings, it has had as its foremost consideration the rights and wel-
205 fare of the property owners in the subdivision of Belle Haven and was the sole factor in this defendant's agreement to accept nominal damages, and this defendant does not now believe that its understandings and proposed stipulations have been complied with.

BELLE HAVEN REALTY CORPORATION
By: J. RANDALL CATON, JR.,
111 S. Fairfax St.,
Alexandria, Va.

---

Certificate of Service (Omitted in printing)

---

215 IN UNITED STATES DISTRICT COURT

(Title omitted)

**Affidavit of Edward S. Holland, C.E.—Filed December 19, 1950**

STATE OF VIRGINIA }
CITY OF ALEXANDRIA } ss:

I, Edward S. Holland, being first duly sworn, on oath state:

I am a civil engineer and surveyor with my office at 316 S. Washington Street, Alexandria, Va. I received my C. E. degree

at the University of Maryland in 1933. In 1936, I was certified by the State of Virginia as a land surveyor. In 1947, I was licensed in Virginia as a professional engineer, civil engineer branch. I have designed and supervised the construction of several sanitary sewer systems, including additions to the system serving the subdivision of Belle Haven. I have also designed simple sewage disposal plants.

I am familiar with the design and construction of the Belle Haven sewer system and its outfalls. The system is largely on a hill, and was, prior to about 1944, a self-sufficient, integrated system. Its sewage flowed by gravity through two outfalls, the western one outletting into Hunting Creek (a tributary of the Potomac River), and the eastern one into the Potomac directly. About 1944 the Federal Works Agency (F.W.A.) constructed a trunk sewer system (known as the Holmes Run Trunk 216 Sewer) serving other sections of Fairfax County, and outletting into the Potomac just east of Belle Haven. A lateral line was run by F.W.A. from Fair Haven (a subdivision to the west of Belle Haven) into the trunk line; and this lateral was cut into the west outfall line of the Belle Haven system running along Route No. 1 (Richmond Road). The Fair Haven sewage flowed thence into the trunk line north of Belle Haven. F.W.A. then blocked off the original outfalls of the Belle Haven system, outletting its sewage through the main outlet of the trunk system. This was all done about 1944.

The trunk system is thus a gravity system running past the foot of Belle Haven hill. The only benefit from an engineering standpoint received by the trunk system from the Belle Haven system was the convenience of flowing the Fair Haven sewage through portions of the Belle Haven west outfall. The taking of the main Belle Haven system in 1948 contributed nothing whatever from an engineering standpoint to the trunk system, and was totally unnecessary for the construction or operation of the trunk system. The Belle Haven system gained no benefit whatever from being connected to the trunk system.

EDWARD S. HOLLAND
Edward S. Holland

Subscribed and sworn to before me this 19th day of December, 1950.

(SEAL)

LILLIAN S. ELLMORE
*Notary Public*
My commission expires July 21, 1953

217 IN UNITED STATES DISTRICT COURT

THE WHITE HOUSE
WASHINGTON
Mar. 11, 1942

My dear General Fleming:

Pursuant to Title II of the Act of October 14, 1940 (Public No. 849, 76th Congress), as amended, I hereby find that an acute shortage of public works or equipment for public works, as indicated opposite the name of the place listed below, necessary to the health, safety, or welfare of persons engaged in national defense activities, exists or impends, which would impede national defense activities, in the area or locality in and about the following place:

| Place | Public Works or Equipment Required | Total Estimated Cost |
|---|---|---|
| Various, in Fairfax County, Virginia | Sewer Facilities | $936,000 |

I further find that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists.

I hereby approve your taking action by any of the methods prescribed by said Act to relieve such shortage.

Very sincerely yours,

/s/ FRANKLIN D. ROOSEVELT

Brigadier General Philip B. Fleming
Federal Works Administrator
Washington, D. C.

(File endorsement omitted)

254 IN UNITED STATES DISTRICT COURT

December 3, 1951.

(Title omitted)

**Memorandum of Opinion—Filed December 3, 1951**

On December 13, 1944, the United States of America filed its petition for condemnation in this action. Upon this petition, an

amended petition and declarations of taking, an order was entered herein on April 8, 1948, vesting title in petitioner, and awarding possession to petitioner, of all the real estate and easements comprising the entire Belle Haven sewer system. At that time, only Belle Haven Realty Corporation was a party respondent. Pursuant to a previous understanding Belle Haven Realty Corporation interposed no objection to the Government's taking, and the Government deposited only nominal damages as estimated just compensation.

Beginning about 1925, Belle Haven Realty Corporation began the development of a residential subdivision in Fairfax County, Virginia, near the City of Alexandria. In the development, streets and lots were laid off and a complete and adequate sewer system was installed. From time to time, lots were sold to individuals, who built residences. The cost of the installation of the sewer system was prorated, and a proportionate part of such cost was included in the price paid by the purchasers of the lots. In
255 their conveyances of lots to purchasers, Belle Haven Realty Corporation did not specifically mention the sewer system, but did include in the conveyances a grant of "all appurtenances to the same and in any wise belonging." As houses were built, they were connected to the sewer system and no charge for the use of the system was made against the property owners. After the entry of this country into World War II in December 1941, the demand for housing accommodations in the vicinity of Washington became very acute. Acting under the authority of the statute known as the Lanham Act, as amended, 54 Stat. 1125, 55 Stat. 361, Government agencies undertook to increase the facilities for housing defense workers in the City of Alexandria, Arlington and Fairfax Counties, amongst other nearby territories. Of course, sewerage was necessary for the defense housing, and the Government prepared a very comprehensive plan for the disposal of sewerage in Fairfax County. In the spring of 1943 a Government engineer requested the Belle Haven Realty Corporation for permission to use some of its sewer facilities. At that time, of course, the Belle Haven subdivision had a completely integrated sewer system with outfalls into the Potomac River. Belle Haven refused this request, whereupon, after negotiations, to quote from Belle Haven's answer, "there arose an agreement that this defendant (Belle Haven Realty Corporation) would accept nominal damages of a dollar provided that the entire system in Belle Haven be taken, including all laterals, and that in the final order it be provided that there be no maintenance, operation, construction, reconstruction, replacements, or easement charges, against any lot, lots, or parts of lots, within the recorded subdivision of Belle Haven, made and recorded prior to January 1, 1943; that there be no main-

tenance, operation, construction, reconstruction, replacements, or easement charges against any lots to be created abutting those sewers now built and existing in easements, dedicated streets, or proposed streets, . . . ."

It seems never to have occurred to either the Government or to Belle Haven Realty Corporation that the individual lot owners had any interest or ownership in the sewer system. Accordingly, this action was instituted naming only Belle Haven Realty Cor-
256 poration as respondent. The Government proceeded to take the Belle Haven sewer system, to connect it with certain trunk sewers, and generally to integrate it with its comprehensive sewer system. Thereafter, the Government leased the sewer system to Fairfax County, Virginia, acting for and on behalf of Sanitary District No. 1 of Fairfax County. Sometime prior to August 31, 1948, Fairfax County began sending monthly bills to Belle Haven householders in the amount of $2.00 each, as a sewer service charge, which amount, according to the Belle Haven householders, was sufficient to cover not only the costs of maintenance and operation of the Belle Haven sewer system, but also included an amount for the amortization of the costs of installation of the trunk line sewer to which the Government connected the Belle Haven system.

Certain lot owners, together with Belle Haven Citizens Association, Inc., felt themselves aggrieved and filed their motion to intervene herein and protect their rights. The Government opposed such intervention, but I, for reasons set out in an opinion therewith filed, reached the conclusion that the householders had acquired equitable interests in the sewer system, and entered an order allowing the individual lot owners to intervene and seek just compensation for their interests in real estate taken by the Government. This opinion is reported as *United States* v. *Certain Parcels of Land in Fairfax County, Virginia, et al.* (*Davis, Intervenor, et al.*), 89 F. Supp. 567.

In their answers, intervenors waived any claim to monetary reimbursement provided the court include in its judgment of taking a stipulation that neither they, nor other lot owners similarly situated, be required to pay any service charge greater than enough to defray the costs of maintenance and operation of their sewer system: that is, that they be protected from being required to pay any part of the amortization of the cost of the trunk line or other part of the sewer system. The Government's motion to strike out this prayer raised the question of whether or not this court could, over its protest, impose such a limitation on the Government's taking.

Inasmuch as the Belle Haven householders had a sewer system ample for their needs, which they had paid for as part of the purchase prices of their lots, the contention of the intervenors

257 did not seem to me unreasonable. However, I came to the conclusion that, without its consent, under the law I was powerless to impose any such limitation or condition on the Government's taking. This opinion is reported as *United States* v. *Certain Parcels of Land in Fairfax County, Virginia, et al.* (*Davis, Intervenor, et al.*), 89 F. Supp. 571.

The intervenors, being allowed to amend their answers, have filed answers as mentioned at the outset hereof, directly attacking the authority of the Government to acquire their sewer system by condemnation and praying that the Government be required to restore their sewer system to the condition in which it was before the Government's taking.

Intervenors rely heavily on *Puerto Rico Light & Power Co.* v. *United States* (1st Circ.), 131 F. (2d) 491. It is true that under the Lanham Act, the District Court in this case allowed the Government to condemn an entire electric power and tramway system and integrate it with the Government's water power project, and the Circuit Court reversed on the ground that the condemnation was not authorized by the Lanham Act. I have reached the conclusion that the Government's taking here was unauthorized, but I do not find it necessary to rely on the *Puerto Rico* case, *supra*.

Subsequent to the *Puerto Rico* case, and, it would seem, to some extent on account of it (Congressional Record, July 6, 1943, pp. 7286, 7287), the Lanham Act was amended. 57 Stat. 565. At the time of the institution of this action, the Lanham Act contained the following proviso:

> "Provided *further*, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works, and with the consent of the owners thereof, . . ."

When this proviso came to my attention in the consideration of the briefs which had been filed, I wrote to Government counsel (with copies to other counsel) as follows:

258 "While I have come to no final conclusion, and will not before hearing from you, it appears to me that the Belle Haven sewer system was undoubtedly 'public works already operated by' a private agency. If that be true, even though it be conceded for the sake of argument, that funds were allotted for substantial additions or improvements, was the taking with 'the consent of the owners thereof?' I should think that the consent referred to would mean an unconditional consent, and intervenors contend that the consent of Belle Haven Realty Corporation was only a conditional con-

sent. However, even if it be conceded that the necessary consent was obtained from Belle Haven Realty Corporation, was that sufficient? The Government's brief and amendatory paragraph refer to Belle Haven Realty Corporation as the '*purported owner*'. There is no such language as that in the statute. The statute says '*consent of the owners.*' Assuming the correctness of my previous holding that the property owners who had purchased from Belle Haven Corporation owned easements in and to the sewer system, were they not also owners *pro tanto* of the sewer system? If the property owners were in fact part owners of the sewer system, no consent having been obtained from them, how can the Government's taking be justified?''

Thereupon, Government counsel requested leave to file a supplemental brief, which leave was granted, and at the request of all parties, the whole matter was deferred for a number of months while interested parties sought an amicable solution of the matter. Failing to reach an amicable solution, supplemental briefs have been filed by both sides, and upon consideration thereof, I am still of the opinion rather plainly indicated by my letter to Government counsel.

On the question of whether or not the individual Belle Haven property owners acquired interests in the sewer system when they purchased their lots, the Government's supplemental brief cites certain Virginia decisions which seem to me to support the conclusion which I had previously reached herein (89 F. Supp. 567). The cases cited in the Government's supplemental brief are *City of Danville* v. *Forest Hills Development Corp.*, 165 Va. 425, 182 S. E. 548; *City of Richmond* v. *Henrico County*, 185 Va. 176, 37 S. E. (2d) 873; *Payne* v. *Godwin*, 147 Va. 1019, 133 S. E. 481, and *Lindsay* v. *James*, 188 Va. 646, 51 S. E. (2d) 326.

Inasmuch as the proviso quoted above was a part of the Lanham Act at the time this action was instituted, the conclusion seems to me inescapable that the sewer system here sought to be acquired by the Government could only be acquired, ''with the consent of the owners thereof.'' I do not believe that the qualified consent of the Belle Haven Realty Corporation was sufficient to
259 comply with the statute, but even if I should be wrong as to this, the Government does not even contend that it secured the consent of the individual lot owners, and I do not feel any doubt that they were included amongst the ''owners'' of the property sought to be acquired.

It therefore follows that an order will be entered, setting aside the orders heretofore entered herein vesting title in, and awarding possession to the Government, and dismissing this action. I am of

the opinion that this court has no power in this action to require the Government to restore the Belle Haven sewer system to its condition prior to the Government's taking. If the owners of the Belle Haven sewer system have suffered compensable damage by reason of the Government's taking, they must seek their relief in an appropriate action.

A. W. BARKSDALE
*United States District Judge Designate.*

---

(File endorsement omitted)

260 IN UNITED STATES DISTRICT COURT

December 3, 1951.

(Title omitted)

**Order Dismissing Petition—Filed December 1, 1951**

Upon the amended answer of intervening defendants, W. Ralph Davis, Frank A. Leamy, Margaret M. Boothe, for etc., filed herein on April 28, 1950, containing allegations which render said amended answer, in effect, a motion to dismiss, and which, without objection, has been by all parties considered as a motion to dismiss; oral argument, written briefs and supplemental briefs on behalf of the petitioner and said intervening defendants having been maturely considered by the court, the court being of the opinion, for reasons stated in a Memorandum of Opinion herewith filed, that the condemnation of land and easements thereto appertaining, sought herein by petitioner, is not authorized by the statute relied upon by petitioner for its authority
261 to condemn the real estate and easements thereunto pertaining, it is so adjudged. It is therefore

ORDERED

that the order entered herein on April 8, 1948, vesting title in petitioner, and awarding to petitioner possession of the real estate and easements thereunto pertaining, described in petitioner's petition and amended petition and in said order, the order entered herein on February 24, 1949, vesting title in petitioner to certain property, together with any other orders which may have been entered herein vesting title in petitioner, and awarding to petitioner possession of said real estate, be, and the same are, hereby set aside and held for nought.

And it is further

ORDERED

that this action be, and the same is, hereby dismissed and stricken from the docket at the costs of the petitioner: to all of which action by the court, petitioner, by counsel, objected and excepted for reasons fully stated to the court.

It is further

ORDERED

that the Clerk certify and mail copies hereof, together with copies of the Court's Memorandum of Opinion, to Frederick A. Ballard, Esquire, American Security Building, Washington 5, D. C.; J. Randall Caton, Jr., Esquire, 111 South Fairfax Street, Alexandria, Virginia, and A. Carter Whitehead, Esquire, United States Attorney, Richmond, Virginia.

Enter:

A. W. BARKSDALE
*United States District Judge, Designate.*

---

271 IN UNITED STATES COURT OF APPEALS

**Argument and Submission**

April 7, 1952, (April term, 1952) cause came on to be heard before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges, and was argued by counsel and submitted.

---

272 IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6399

UNITED STATES OF AMERICA, *Appellant*,

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, and BELLE HAVEN REALTY CORPORATION, ET AL.; and W. RALPH DAVIS, FRANK A. LEAMY, MARGARET M. BOOTHE, Individually and as Officers of BELLE HAVENS' CITIZENS' ASSOCIATION, a Corporation, Interveners, *Appellees*.

*Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.*

**Opinion—Filed May 10, 1952**

(Argued April 7, 1952. Decided May 10, 1952.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Edmund B. Clark, Attorney, Department of Justice, (Wm. Amory Underhill, Assistant Attorney General; A. Carter Whitehead, United States Attorney, and John F. Cotter, Attorney, De-
273 partment of Justice, on brief) for Appellant; and Frederick A. Ballard (J. Randall Caton and Joseph W. Wyatt on brief) for Appellees.

PARKER, Chief Judge:

This an appeal in a suit brought to condemn a sewer system which had been constructed by the Belle Haven Realty Corporation of Fairfax County, Virginia, and which served persons who had purchased building lots from that corporation. The suit was instituted in 1944 "to acquire an easement for the construction and operation of sewer pipes in land occupied by sewer pipes" of the corporation. By amendments to the petition and declaration

of taking, filed in April 1948, the scope of the taking was enlarged to acquire easements in the lateral sewer lines and also title to all sewer mains previously constructed by the corporation in the area. At the time of the first declaration of taking, just compensation estimated at $2 was deposited, at the time of the second declartion of taking, the amount deposited as just compensation was $1. The condemnation proceedings purported to be instituted under authority of the Lanham Act of October 14, 1940, 54 Stat. 1125, as amended June 28, 1941, 55 Stat. 231, and July 15, 1943, 57 Stat. 565, 42 U.S.C. sec. 1531 et seq.

In August 1948, owners of property served by the sewer system filed petitions asking that they be allowed to intervene in the proceeding alleging that they were owners of an interest in the sewer system sought to be condemned; that they had paid for the system by paying their share of the construction cost in the purchase of their lots; that they had acquired rights and easements with respect to the system which entitled them to use it free of charge;
that the United States had connected the system with a sys-
274 tem which it had constructed and had leased the consolidated system to Fairfax County; and that Fairfax County in defiance of their right to use the system free of charge had assessed against each of them a monthly charge of $2. They asked that they be allowed to intervene and assert their rights in the premises and an order was entered allowing intervention, the court holding that the Belle Haven property owners had acquired easements in the sewer system as it existed at the time of their purchases. See *United States* v. *Certain Parcels of Land, etc.*, 80 F. Supp. 571.

In the answer which they sought to file, the intervening property owners stated that they waived claims to monetary compensation for the taking of their easements in the sewer system on condition that, in lieu of monetary compensation, the court include in the judgment of taking a provision that they be not assessed anything in excess of the cost of maintenance of the sewer system taken and specifically that they be not charged with any amount for amortization of the trunk line system with which the system taken had been connected. Upon motion of the United States, this portion of the answer was stricken by the District Judge on the ground that, in awarding compensation to the property owners, the court was without power "to reduce the fee simple taken by the government by imposing easements thereon or limitations on the use of the property taken". *United States* v. *Certain Parcels of Land, etc.*, 89 F. Supp. 567.

Following the order striking this portion of the answer of the intervenors, the Belle Haven Realty Corporation, which had not answered up to that time, filed an answer in which it stated that

the cost of the sewer system had been added to the purchase price of the Belle Haven Realty Development, that it was the owner of the sewer system subject to the equities of the property
275 owners and was entitled to reproduction cost less depreciation as compensation for the taking. By way of further answer it stated that its agreement to accept nominal damages was conditioned upon its being provided in the final order that there be "no maintenance, operation, construction, reconstruction, replacement, or assessment charges" against any lot in the Belle Haven subdivision which had been sold prior to that time. The intervenors filed amended answers challenging the right of the government to maintain the suit under the Lanham Act. In the light of these answers and the facts developed at a number of pretrial hearings, the court entered an order dismissing the suit, on the ground that the consent of the owners of the sewer system had not been obtained as required by the provisions of the Lanham Act. See *United States* v. *Certain Parcels of Land, etc.*, 101 F. Supp. 172. The facts were thus stated by the court below in the opinion then filed:

> "Beginning about 1925, Belle Haven Realty Corporation began the development of a residential subdivision in Fairfax County, Virginia, near the City of Alexandria. In the development, streets and lots were laid off and a complete and adequate sewer system was installed. From time to time, lots were sold to individuals, who built residences. The cost of the installation of the sewer system was prorated, and a proportionate part of such cost was included in the price paid by the purchasers of the lots. In their conveyances of lots to purchasers, Belle Haven Realty Corporation did not specifically mention the sewer system, but did include in the conveyances a grant of 'all appurtenances to the same and in any wise belonging.' As houses were built, they were connected to the sewer system and no charge for the use of the system was made against the property owners.
>
> After the entry of this country into World War II in De-
> 276 cember 1941, the demand for housing accommodations in the vicinity of Washington became very acute. Acting under the authority of the statute known as the Lanham Act, as amended, 54 Stat. 1125, 55 Stat. 361, Government agencies undertook to increase the facilities for housing defense workers in the City of Alexandria, Arlington and Fairfax Counties, amongst other nearby territories. Of course, sewerage was necessary for the defense housing, and the Government prepared a very comprehensive plan for the disposal of sewerage in Fairfax County. In the Spring of 1943, a Govern-

ment engineer requested the Belle Haven Realty Corporation for permission to use some of its sewer facilities. At that time, of course, the Belle Haven subdivision had a completely integrated sewer system with outfalls into the Potomac River. Belle Haven refused this request, whereupon, after negotiations, to quote from Belle Haven's answer, 'there arose an agreement that this defendant (Belle Haven Realty Corporation) would accept nominal damages of a dollar provided that the entire system in Belle Haven be taken, including all laterals, and that in the final order it be provided that there be no maintenance, operation, construction, reconstruction, replacements, or easement charges, against any lot, lots, or parts of lots, within the recorded subdivision of Belle Haven, made and recorded prior to January 1, 1943; that there be no maintenance, operation, construction, reconstruction, replacements, or easement charges, against any lots to be created abutting those sewers now built and existing in easements, dedicated streets, or proposed streets, * * *."

We think it clear that this suit for the condemnation of an existing sewer system cannot be maintained under the Lanham Act. The provision of the statute relied on (Act of Oct. 14, 1940, Title II (Lanham Act), sec. 202, as added June 28, 1941, 55 Stat. 362, 42 U.S.C. sec. 1532) is as follows:

277 "Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden of an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the (Federal Works Administrator) is authorized, with the approval of the President, in order to relieve such shortage—(a) To acquire, prior to the approval of title by the Attorney General if necessary * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation (including proceedings under sections 257, 258, 361-368 and 258a-258e of Title 40, for such public works."

Other sections of the statute make provision for the construction of public works, utilization of existing works, grants in aid etc.; but none of the others grants any power to exercise the right of eminent domain.

A sewer system is a system of drainage pipes, not lands or interests in lands. Easements in land are essential to the maintenance of such system; but the power to condemn easements in order that a system may be constructed does not carry with it the power to condemn an existing system. *Puerto Rico Ry. Light & Power Co.* v. *United States*, 1 Cir. 131 F. 2d 491, 499. Counsel for the government assert the contrary, but they cite no authority to sustain their position, and we know of none. The rule is well settled that a general power of condemnation does not authorize the condemnation of property already legally appropriated to a public or quasi public use, in the absence of legislative au-
278 thority expressly given or necessarily implied. 18 Am. Jur. 723-724; 29 C.J.S. 866; 10 R.C.L. 198-199; note 173 A.L.R. 1379; *Alexandria & F. R. Co.* v. *Alexandria & W.R. Co.*, 75 Va. 780, 40 Am. Rep. 743; *Vermont Hydro-Electric Corp.* v. *Dunn*, 95 Vt. 144, 112 A. 223, 12 A.L.R. 1495; *Old Colony R. Co.* v. *Framingham Water Co.*, 153 Mass. 561, 27 N.E. 662; 13 L.R.A. 332. A fortiori a general power to condemn lands may not be construed to authorize the condemnation of a public works system merely because easements in land are appurtenant thereto. This would seem to be elementary.

That it was not the intention of Congress to authorize the acquisition of existing public works systems under the Lanham Act was not only decided, and we think correctly so, in *Puerto Rico Ry. Light & Power Co.* v. *United States, supra*, but was also expressed subsequent to that decision by Congress itself in the act of 1943 increasing the appropriation for the acquisition of property under the Lanham Act. The act increasing the appropriation contained the following proviso: "* * * Provided further, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *". Act of July 15, 1943, 57 Stat. 565, as amended July 3, 1945, 59 Stat. 383, 42 U.S.C.A. sec. 1534.

The purpose of this proviso was thus stated by Senator Taft, upon whose motion it was written into the appropriation bill:

> "Mr. President, the first clause of the Amendment provides 'that none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies.'
>
> 279 "When the subcommittee of the Committee on Territorial and Insular Affairs were in Puerto Rico we found that the F.W.A. took 10 million of this rather limited fund intended for the construction of works in connection with the housing

in industrial areas and used it to acquire all the power companies of Puerto Rico, the San Juan Power Company and the Mayaquez Power Company. So far as I can see there was no real justification for that. As a matter of fact, the Federal Circuit Court in Boston subsequently held that there was an illegal application of those funds.

"I do not mean to say that it might not be desirable for the insular government, which owned a good many of the power facilities, the dams and the like, to take over the private power companies and consolidate them all into one system, but certainly there was nothing in the Lanham Act which authorized any such proceeding. It was intended to provide new facilities, it was not intended to provide for taking over old facilities. I think it is perfectly clear that no such power should be included in the Act." Cong. Rec. July 6, 1943, p. 7286.

On the following day Senator Taft consented to the modification of the proviso so as to permit the acquisition of an existing utility with the consent of the owner, saying:

"Mr. President, yesterday I offered an amendment which was agreed to. The Public Works Agency objects to the limitation which provides 'that none of the funds authorized herein shall be used to acquire public utilites already operated by public or private agencies.'

"When the amendment was offered, I referred to the Puerto Rican case. The Public Works Agency cites a case of a railway connection with a naval plant in one of the western states where they must have the railroad in order to complete the whole railway project which the Navy desires.
280 The railroad is worth, let us say, $1,000,000, and they are to put in $2,000,000 in order to complete the project. They have asked that in a case of that kind they be authorized to take over the existing work, where they are enlarging it. Even in such cases I do not think the authority should be given except with the consent of those who own the existing public works. Therefore I agree to an amendment so that the amendment would read: (Final form)." Cong. Rec., July 7, 1943, p. 7314.)

This shows beyond peradventure that it was the intention of Congress that public works should not be acquired under the Lanham Act without the consent of the owners; and the case was dismissed by the judge below on the ground that no such consent had been obtained. We think that this was correct, whether the ownership of the system be regarded as being in the Realty Cor-

poration or in the lot owners who had paid for it and whose rights and easements constituted the only real value that it had. The lot owners could not be deprived of these rights and easements without just compensation;* and it is reasonable to interpret the consent required by the statute as applying to them as well as to the Realty Corporation which had built the system but whose interest therein no longer had any appreciable value. If, however, we look to the Realty Corporation alone, the consent necessary to acquisition by the government is not shown, since its consent was given upon a condition which the government is unwilling to accept. The government contends that this appears merely from the answer of the corporation and has not been established by evidence. The judge found it as a fact, however, after hearing the parties in a number of pre-trial conferences. Furthermore, the government has not pleaded compliance with the condition which it
281 should have done, as it was expressly made a condition precedent to the right to acquire the property. See 18 Am. Jur. 961-962. Of course, if the owners of the property consented to its acquisition, there would be no necessity for condemnation or for the maintenance of this proceeding to condemn. The Realty Corporation does not consent except upon a condition that the government is unwilling to accept. So far as the lot owners are concerned, they not only have not consented but the government has not so much as asked that their interests be condemned.

We need not give consideration to this proviso, however, nor to failure to plead compliance with the conditions which it imposes. It is perfectly clear, as pointed out above, that the power of condemnation given by the Lanham Act extends only to lands or interests in lands; and, even though the condition be ignored, there is nothing in the act which authorizes the condemnation of a public works system such as this. So far as the situation here is concerned, the proviso merely emphasizes a lack of power to condemn which seems perfectly obvious without it.

For the reasons stated, we think that the condemnation suit was properly dismissed; and we cannot see that any undesirable results are likely to follow from the dismissal. The Belle Haven system is being utilized in the public works program as a result of the connection of the system with the system constructed by the government, and this will not be affected by the dismissal. All that remains are questions arising out of rights in the Belle Haven system, which can be adjudicated in proceedings properly brought for that purpose. We find nothing in the Lanham Act, however, which would justify the settlement of these questions here. Certainly there is nothing in that act which authorizes the government
282 to take from abutting owners without compensation and

* See opinion below 89 F. Supp. 571, and 18 Am. Jur. pp. 787-788.

without their consent their rights in an existing public works system.

The case before us comes to this. Owners of property in a suburban subdivision are served by a sewer system which was constructed for their use and was ultimately paid for by them. For the benefit of the government, and not for their benefit, this system has been connected with another system built by the government and the integrated system has been leased to Fairfax County. In order that the county may assess the same charges against those entitled to the use of the Belle Haven system that it assesses against others who have no such rights, the government attempts to acquire the Belle Haven system by paying $3 to the company which constructed it and ignoring the rights of those who are as truly the real owners of that system as if it had been built by them as a cooperative enterprise. There is nothing in the Lanham Act which authorizes this to be done.

*Affirmed.*

---

284 IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6399

UNITED STATES OF AMERICA, *Appellant*,

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, and BELLE HAVEN REALTY CORPORATION, ET AL.; and W. RALPH DAVIS, FRANK A. LEAMY, MARGARET M. BOOTHE, Individually and as Officers of BELLE HAVEN CITIZENS' ASSOCIATION, a Corporation, Interveners, *Appellees*.

**Judgment—Filed and Entered May 10, 1952**

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER
*Chief Judge, Fourth Circuit.*
MORRIS A. SOPER
*U. S. Circuit Judge.*
ARMISTEAD M. DOBIE
*U. S. Circuit Judge.*

288 (Clerk's Certificate to foregoing transcript omitted in printing.)

(File endorsement omitted)

289 IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1952

(Title omitted)

**Stipulation as to Record—Filed November 6, 1952**

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

1. Petition in Condemnation filed December 13, 1944, omitting plat.
2. Declaration of Taking filed December 13, 1944, omitting description of land in Schedule A.
3. Amended petition filed April 8, 1948, omitting description and plat.
4. Application for leave to intervene with proposed answer, filed August 31, 1948.
5. Motion to intervene of Harry E. Cunningham, filed October 28, 1948, and amended motion and exhibit.
6. Memorandum of opinion filed November 4, 1948.
7. Order granting leave to intervene filed November 4, 1948.
8. Intervenors' motion for temporary injunction filed February 11, 1950.
9. Government's motion to strike filed March 21, 1950.
10. Order filed March 29, 1950.
11. Memorandum of opinion filed March 30, 1950.
12. Amended answer of intervening defendants filed April 25 (28?), 1950.

290 13. Answer of Belle Haven Realty Corporation filed December 14, 1950.

14. Affidavit of Edward S. Holland filed December 19, 1950.

15. Letter of authorization (dated March 11, 1942) filed December 19, 1950.

16. Memorandum of opinion filed December 3, 1951.

17. Order of dismissal filed December 3, 1951.

18. Proceedings in the United States Court of Appeals for the Fourth Circuit.

19. Argument of Cause.

20. Opinion of Court of Appeals filed May 10, 1952.

21. Judgment entered and filed May 10, 1952.

22. Clerk's certificate.

23. Order granting writ of certiorari.

24. This stipulation.

It is further stipulated and agreed that counsel may refer in their briefs and argument to the record on file in this Court, including any part thereof which has not been printed.

ROBERT L. STERN
Robert L. Stern
*Acting Solicitor General*
*Counsel for Petitioner*
FREDERICK A. BALLARD
*Counsel for Respondents*

---

293 SUPREME COURT OF THE UNITED STATES

No. 253, October Term, 1952.

(Title omitted)

**Order Allowing Certiorari—Filed October 13, 1952**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆U.S. GOVERNMENT PRINTING OFFICE 1952—231409/P.O. 700

# PETITION FOR WRIT of CERTIO-RARI

FILED
AUG 5 1952
CHARLES ELMORE CROPLEY
CLERK

No. 253

LIBRARY
SUPREME COURT, U.S.

# In the Supreme Court of the United States

OCTOBER TERM 1952

---

UNITED STATES OF AMERICA

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Reasons for granting the writ | 6 |
| Conclusion | 11 |


## CITATIONS

Cases:


| | |
|---|---|
| *Carmack* v. *United States*, 135 F. 2d 196 | 10 |
| *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, decree vacated as moot, 289 U. S. 705 | 10 |
| *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491 | 8, 9 |
| *United States* v. *Carmack*, 329 U.S. 230 | 6-7, 9 |
| *United States* v. *Carmack*, 151 F. 2d 851, reversed, 329 U. S. 230 | 10 |
| *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372 | 10 |
| *United States* v. *City of Tiffin*, 190 Fed. 279 | 9 |
| *United States* v. *Parcel of Land*, 32 F. Supp. 718 | 10 |
| *United States* v. *Southern Power Co.*, 31 F. 2d 852 | 10 |
| *United States* v. *State of Montana*, 134 F. 2d 194, certiorari denied, 319 U.S. 772 | 10 |
| *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, reversing 150 F. 2d 613 | 10 |


Statutes:


| | |
|---|---|
| Condemnation Act of August 1, 1888, 40 U.S.C. 257 | 7 |
| Public Buildings Act of May 25, 1926, 40 U.S.C. 341 | 7 |
| Act of June 28, 1941, sec. 202, 55 Stat. 361, 42 U.S.C. 1532, amending the Lanham Act of October 14, 1940, 54 Stat. 1125 | 2, 4, 5, 8 |
| Act of July 15, 1943, 57 Stat. 565 | 2, 3 |

# In the Supreme Court of the United States

OCTOBER TERM 1952

---

No.

---

UNITED STATES OF AMERICA

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered on May 10, 1952, by the United States Court of Appeals for the Fourth Circuit.

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 33-43) is reported at 196 F. 2d 657. The opinions of the District Court are reported at 89 F. Supp. 567 and 571 and at 101 F. Supp. 172.

## JURISDICTION

The judgment of the Court of Appeals was entered May 10, 1952 (R. 45). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether an Act of Congress authorizing the Federal Works Administrator, with the approval of the President, to acquire "improved or unimproved lands or interests in lands" authorizes the condemnation of easements in lands which contain sewer pipes being used for sewage disposal and deemed to be "already legally appropriated, to a public or quasi-public use."[1]

## STATUTES INVOLVED

So far as material Section 202 of the Act of June 28, 1941, 55 Stat. 361, 362, 42 U.S.C. 1532 provides:

> SEC. 202. Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be

[1] In the event this petition is granted, the Government will also argue that it complied with the conditions upon acquisition imposed by the Act of July 15, 1943, 57 Stat. 565 (see p. 3, *infra*).

provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Federal Works Administrator is authorized, with the approval of the President, in order to relieve such shortage—

(a) To acquire, * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works.

The Act of July 15, 1943, 57 Stat. 565, an appropriation act, provided:

none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *.

## STATEMENT

During World War II, the Federal Works Agency found it necessary to install a sewerage system for defense housing in Fairfax County, Virginia, and to utilize existing, privately-owned easements containing sewer pipes as a part of the trunk line of that system. Accordingly, on December 13, 1944, the United States filed a peti-

tion in condemnation and a declaration of taking to acquire a permanent easement for the construction and operation of sewer-pipe lines in land occupied by sewer pipes of the Belle Haven Realty Corporation in the real estate subdivision of Belle Haven. Estimated just compensation of $2.00 was deposited. On April 8, 1948, by amendments to the petition and declaration of taking, the scope of the taking was enlarged to include easements in additional lands in the subdivision and also title to all sewer mains previously constructed by the corporation in the area. An additional $1.00 was deposited. This was done under authority of Section 202 of the Act of June 28, 1941, 55 Stat. 361, 42 U.S.C. 1532, amending the Lanham Act of October 14, 1940, 54 Stat. 1125 (*supra*, p. 2).

The United States connected the outlets of the existing system to the sewer system it had constructed. It leased the entire system to the Board of Supervisors of Fairfax County with permission to make reasonable charges for the services. On November 4, 1948, the district court granted an application filed by several owners in the subdivision to intervene as holders of implied easements in the original system. 89 F. Supp. 571 (R. 1-4). They asked that the court, in lieu of compensation for the taking, fix the reasonable charge of disposing of their sewage and, in February 1950, they filed an application to restrain collection of any charges until the condemnation

proceedings were concluded. On March 30, 1950, the court denied the application and granted the Government's motion to strike from the answer the claim that the court should fix the reasonable charge of disposing of their sewage. 89 F. Supp. 567 (R. 4-10).

On April 27, 1950, the intervenors filed an amended answer denying the Government's authority to condemn, and asking restoration and return of the sewer system in its original condition. On December 14, 1950, the Belle Haven Corporation, which had not answered to this time, finally did so. It claimed as just compensation the present reproduction cost of the system less depreciation. On December 3, 1951, the district court entered judgment dismissing the condemnation proceding. It held that the amendment of the Lanham Act of July 15, 1943, 57 Stat. 565, in providing that public works already operated by public or private agencies should not be acquired "except * * * with the consent of the owners thereof" (*supra*, p. 3) required the consent not only of the Belle Haven Realty Corporation but also of those who were served by the sewerage system. It concluded that the corporation had only conditionally consented and that those who used the system had not been consulted. 101 F. Supp. 172 (R. 13-19).

The Court of Appeals affirmed on the ground that Section 202 of the Act of June 28, 1941

(*supra*, p. 2), did not authorize this condemnation. And, while approving the trial court's construction of the 1943 amendment, it declined to consider this provision because: "It is perfectly clear * * * that the power of condemnation given by the Lanham Act extends only to lands or interests in lands; and * * * there is nothing in the act which authorizes the condemnation of a public works system such as this. So far as the situation here is concerned, the [1943 amendment] merely emphasizes a lack of power to condemn which seems perfectly obvious without it." 196 F. 2d 657, 662 (R. 33-43).

## REASONS FOR GRANTING THE WRIT

1. Contrary to the decision below, the Lanham Act's general authorization of the condemnation of "improved or unimproved lands or interests in lands" permits acquisition of a perpetual easement in the lands here involved and the sewer pipes contained therein. The Court of Appeals held that since these pipes were already being used for sewage disposal, and in its view "already legally appropriated, to a public or quasi public use," the land could not be acquired under a statute containing a general authorization to condemn, but only under one which expressly or by necessary implication authorized its condemnation.

In so holding, the lower court has failed to follow this Court's decision in *United States* v.

*Carmack*, 329 U.S. 230, 242, in which it reversed the Court of Appeals for the Eighth Circuit for applying the same rule of construction to other condemnation statutes of the United States. In the *Carmack* case, the United States had sued to condemn, as the site of a post office and custom house, land owned by a Missouri municipality and used by it for a park, courthouse, city hall, and public library. The acquiring officials, the Federal Works Administrator and the Postmaster General, relied on the general Condemnation Act of August 1, 1880, 40 U.S.C. 257, authorizing the condemnation of "real estate" and the Public Buildings Act of May 25, 1926, 40 U.S.C. 341, authorizing condemnation of "sites and additions to sites." The Court of Appeals affirmed an order dismissing the proceeding on the ground that the statutes in question did not specifically authorize selection of property already devoted to public purposes. 151 F. 2d 881. This Court granted the Government's petition for certiorari, and reversed, saying (329 U.S. at p. 242): "We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both Acts, authority for them to acquire by condemnation the site thus lawfully selected."

But in the case at bar the Court of Appeals for the Fourth Circuit has refused to find in the equally broad terms of section 202 of the Act of

June 28, 1941, authorizing acquisition of "improved or unimproved lands or interests in lands" (*supra*, p. 3); authority to condemn easements containing a local sewerage system.[2] If its judgment is not reversed, the decision will be a precedent in the Fourth Circuit for dismissing proceedings to acquire property devoted to public use, brought under the General Condemnation Act, the Public Buildings Act, or any other federal statute which does not specifically authorize acquisition of property of this character.[3]

2. The decision is also in conflict with that of the Court of Appeals for the First Circuit in *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491. The court below asserted—incorrectly—that that case held that the Lanham Act did not authorize the acquisition of existing public works. Rather, the court in the First Circuit there held that, since section 202 of the 1941 Act only authorized the condemnation of "improved or unimproved lands or interests in lands", the Government could not condemn those parts of a public utility system which were personalty. It

---

[2] The error of the lower court's construction is also manifest when regard is had to the 1943 amendment (*supra*, p. 3). If Congress had not previously authorized condemnation of [redacted] works, the amendment—imposing conditions upon their acquisition—would not have been needed.

[3] The opinion of the court below does not mention or refer to the *Carmack* case.

directed dismissal of the entire proceeding because affirmance of the district court's judgment on the declaration of taking as to the realty alone would irrevocably commit the United States to the payment of compensation "for something which the Federal Works Administrator might never have dreamed of taking had he correctly apprehended the limited scope of his powers under the act." Thus, contrary to the instant case, the *Puerto Rico* case does not hold that the Act fails to authorize the condemnation of lands devoted to existing public works. On the contrary, the First Circuit expressly declared that the Act was applicable to such lands and interests in land. 131 F. 2d at 499, 500.

3. It is, of course, well settled that the strict rule of construction, invoked by the court below, applies only to statutes delegating the power of eminent domain to utility corporations[4] and that it has no application to Acts of Congress authorizing government agencies to condemn. See *United States* v. *Carmack*, 329 U.S. 230, 243, fn. 13. The latter statutes invariably have designated the property to be acquired in general terms and have long been interpreted to authorize the condemnation of property devoted to public use for utility purposes or for streets, alleys, parks and the like. See *e.g.*, *United States* v. *City of Tiffin*,

[4] All of the cases cited in the opinion below at R. 39 deal with eminent domain powers delegated to utilities.

190 Fed. 279 (C.C. N.D. Ohio, 1911); *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, 971-973 (C.A. 9, 1932), decree vacated as moot, 289 U.S. 705; *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 377 (D.Md. 1939); *United States* v. *Parcel of Land*, 32 F. Supp. 718, 721 (D.Del. 1940); *United States* v. *State of Montana*, 134 F. 2d 194, 196 (C.A. 9, 1943), certiorari denied, 319 U.S. 772.

The contrary construction by the Fourth Circuit in *United States* v. *Southern Power Co.*, 31 F. 2d 852 (1929), was relied on by the Eighth Circuit in *Carmack* v. *United States*, 135 F. 2d 196, 199-201 (1943) and *United States* v. *Carmack*, 151 F. 2d 881 (1945), which were reversed by this Court. 329 U.S. 230.[5]

4. The question thus presented is an important one. As was the fact at the time of the *Carmack* case, the Government is now engaged in the acquisition of great quantities of land needed for flood control, the armed forces, atomic energy

---

[5] Although the Court of Appeals below expressed approval of the trial court's construction of the July 15, 1943, amendment to the Lanham Act, it declined to make this provision a basis for its judgment, saying: "So far as the situation here is concerned, the proviso [amendment] merely emphasizes a lack of power to condemn which seems perfectly obvious without it" (R. 42). Thus, the court below laid stress upon the fact that it has interpreted a federal condemnation statute in accordance with the rule of construction rejected by this Court in the *Carmack* case. Cf. *United States ex rel. T. V. A.* v. *Welch*, 327 U.S. 546, reversing 150 F. 2d 613 (C.A. 4, 1945).

development, and other national purposes. These acquisitions are generally accomplished by condemnation and, as has been pointed out (p. 9, *supra*), the statutes authorizing the institution of these proceedings designate the property to be acquired in general terms. Under the decision below, these statutes would not permit acquisition of properties already devoted to a public use which are not infrequently comprehended within the large areas needed. Thus, the doubts set at rest in the *Carmack* case are revived and obstacles erected to the expeditious execution of important governmental projects.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN
*Solicitor General.*

JULY 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE 1952—215509/P.C. 62